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in the Supreme Court of the United States

October Term, 1990

CITY GAS COMPANY OF FLORIDA,

Petitioner,

vs.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A divided en banc court of appeals found petitioner, a regulated retailer of natural gas in Florida, liable for monopolization for entering into a territorial agreement with another retailer which had been repeatedly reviewed and approved by the Florida Public Service Commission ("FPSC") under statutory authority expressly upheld by the Florida Supreme Court; and for refusing to sell or transport natural gas at wholesale to respondent, a potential retail competitor demonstrably able to obtain the product from an alternative source at reasonable cost. Under a pervasive scheme of federal and state regulation, sales of natural gas at wholesale by the sole wholesaler in Florida (from which petitioner purchases its entire supply) may be made only to persons granted allocations by the Federal Energy Regulatory Commission ("FERC"), and sales of gas at retail are regulated by the FPSC. The questions presented are:

1. Whether a regulated public utility retailer violates § 2 of the Sherman Act under the "essential facilities" doctrine by declining to sell or transport natural gas at wholesale to a potential retail competitor, where: (a) the retailer has never sold at wholesale; and (b) the retailer's own wholesale supplier is ready and able to supply the potential competitor subject to reasonable conditions prescribed by FERC?

2. Whether petitioner's conduct is protected from antitrust liability by the state action doctrine, given that: (a) a Florida statute expressly permits public utilities to decline to furnish natural gas for resale; (b) the territorial agreement was submitted to and approved by the FPSC pursuant to regulatory authority granted by a state statute and confirmed by a controlling decision of the Florida Supreme Court; and (c) Florida closely regulates the conduct of natural gas utilities in every relevant respect?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, City Gas Company of Florida ("City Gas"),[1] requests that a writ of certiorari issue to review the en banc judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on September 19, 1990.

[1]At the times relevant to this case, City Gas was a Florida corporation. It has since merged into (and is now a division of) Elizabethtown Gas Company, a New Jersey corporation. Pursuant to Supreme Court Rule 29.1, City Gas states that Elizabethtown Gas Company is a subsidiary of NUI Corporation and has no subsidiaries of its own.

OPINIONS BELOW

The panel opinion of the court of appeals (Pet. App. A) is reported at 880 F.2d 297 (11th Cir. 1989). The per curiam plurality opinion and four dissenting opinions of the court of appeals sitting en banc (Pet. App. B) are reported at 912 F.2d 1262 (11th Cir. 1990). The order of the court of appeals granting rehearing en banc (Pet. App. C) is reported at 889 F.2d 264 (11th Cir. 1989). The opinion of the district court (Pet. App. D) is reported at 665 F. Supp. 1493 (S.D. Fla. 1987).

GROUNDS FOR JURISDICTION

The judgment of the court of appeals was entered on September 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The text of § 2 of the Sherman Act, 15 U.S.C. § 2, §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and chapter 366 of the Florida Statutes, Fla. Stat. ch. 366, is set forth in the appendix to this petition (Pet. App. E-H).

STATEMENT OF THE CASE

City Gas is a retail distributor of natural gas serving approximately 100,000 residential, commercial and industrial customers in several Florida counties. It began business in 1949 as a retail distributor of liquid petroleum ("LP") (propane) gas and converted to natural gas when that product became available in Florida in 1960.

The LP gas industry is unregulated. In contrast, the distribution of natural gas is pervasively regulated at both the federal and state levels. Under federal law, any firm

wishing to purchase natural gas from an interstate wholesale supplier must first obtain an "allocation" from FERC, which is charged with determining whether such purchases are "necessary or desirable in the public interest." 15 U.S.C. § 717f(a). FERC also regulates the prices charged by interstate natural gas producers and wholesalers. The rates, services and operations of retail natural gas distributors in Florida are pervasively regulated by the FPSC. *See* Fla. Stat. ch. 366.

City Gas sought and obtained a natural gas allocation from FERC's predecessor agency in 1960 and has since purchased all of its natural gas supply from Florida Gas Transmission Company ("FGT"), the only wholesale supplier of natural gas in the state of Florida. City Gas has never sold natural gas at wholesale.

In 1960, City Gas entered into a territorial agreement with Peoples Gas System, Inc. ("Peoples") under which each party agreed not to sell natural gas in the other's service area. This agreement was submitted to and formally approved by the predecessor of the FPSC, which held that such agreements are in the public interest and should be encouraged. FPSC Order No. 3051, Docket No. 6231-GU (1960) (Pet. App. I), *quoted in Peoples Gas Sys., Inc. v. City Gas Co.*, 167 So.2d 577, 580-81 (Fla. App. 1964), *aff'd*, 182 So.2d 429 (Fla. 1965). In 1962, the agreement was the subject of an action by Peoples against City Gas which ultimately resulted in a Florida Supreme Court decision in favor of Peoples. *City Gas Co. v. Peoples Gas Sys., Inc.*, 182 So.2d 429 (Fla. 1965). The state's highest court held that the Commission has authority under chapter 366 of the Florida Statutes to approve territorial agreements between natural gas utilities; that such agreements are void and unenforceable unless approved by the Commission, whereupon they become "an order of the commission, binding as such upon the parties," *id.* at 436; and that, when

so approved, such agreements do not violate the state antitrust laws.[2]

In March 1982, Respondent Consolidated Gas Company of Florida, Inc. ("Consolidated") was a retail distributor of LP gas to approximately 2000 residential and ten commercial customers in a subdivision of southern Dade County, Florida. Because the price of LP gas at the time was roughly twice that of natural gas, Consolidated decided to leave the unregulated LP gas market and convert its facilities to the distribution of natural gas. When Consolidated contacted FGT, the sole wholesale supplier of natural gas in Florida, it was informed that a FERC allocation would be required in order to purchase gas from FGT, and that Consolidated would have to reimburse FGT for the cost of constructing a connection to FGT's wholesale pipeline—a cost estimated at approximately $250,000. Consolidated accordingly applied to FERC for a natural gas allocation on May 21, 1982.

Despite opposition by FGT (as well as Peoples and City Gas), Consolidated's application was granted by an administrative law judge in November 1983 and affirmed by FERC in September 1984. *Consolidated Gas Co. of Fla. v. Fla. Gas Transmission Co.*, 28 F.E.R.C. ¶ 61,350 (1984). FERC's decision required FGT to sell natural gas to Consolidated at FGT's regulated wholesale rates. The agency also ruled that Consolidated had to pay the cost of constructing a lateral extension between its system and FGT's pipeline. In so ruling, FERC concluded that there was a "reasonable likelihood" that, under these conditions, Consolidated would retain its customers and, therefore, that

[2]Following the decisions of the Florida courts, the FPSC exercised its statutory authority to review and ultimately reaffirm the validity of the City Gas-Peoples territorial agreement on three subsequent occasions. FPSC Orders Nos. 3736 (1965), 5495 (1972) and 5800 (1973).

its proposal to resell natural gas purchased from FGT was "economically feasible." *Id.* at 61,638; App. D-20.

During the course of the FERC proceedings, Consolidated approached City Gas about the possibility of purchasing natural gas at wholesale from City Gas rather than FGT.[3] City Gas offered to sell natural gas to Consolidated at City Gas' wholesale cost plus ten cents per therm,[4] an offer that was later lowered to cost plus seven cents per therm.[5] Although Consolidated's counteroffers went as high as cost plus five cents per therm, it ultimately rejected City Gas' proposal as unreasonable and brought this action against City Gas in United States District Court for the Southern District of Florida, contending that City Gas had refused to deal with it in violation of § 2 of the Sherman Act.[6]

After a bench trial, the district court found City Gas liable for monopolization and awarded Consolidated treble damages of $4,761,195.45, plus interest, costs and attorneys' fees. The district court concluded that City Gas had unlawfully acquired monopoly power by virtue of the 1960 territorial agreement with Peoples Gas, that it had unlawfully maintained that power by refusing to deal with Consolidated, and that neither course of conduct was

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[3]An alternative was to use City Gas' pipes to transport gas purchased from FGT, assuming that FERC granted Consolidated an allocation.

[4]A therm is the standard unit of measurement in the natural gas industry and is equivalent to 100,000 British thermal units.

[5]The wholesale price paid by City Gas to FGT at this time was roughly 32 cents per therm, and the retail price was approximately twenty cents higher. City Gas' offer was thus more than ten cents per therm *below* the rate paid by all of City Gas' other customers—the regulated rate at which City Gas' shareholders receive a fair return on their investment.

[6]Jurisdiction in the district court rested on 28 U.S.C. §§ 1331 and 1337.

protected from antitrust liability under the doctrine of state action immunity.[7]

The district court's judgment was affirmed by a panel of the Court of Appeals for the Eleventh Circuit. City Gas' timely petition for rehearing was granted, and the appeal was reheard en banc. A divided court of appeals reinstated the panel opinion, with four separate dissenting opinions, including an 86-page dissent by Chief Judge Tjoflat.

REASONS FOR GRANTING THE WRIT

Departing from settled antitrust principles and misapplying controlling decisions of this Court, the court of appeals has invoked Section 2 of the Sherman Act to condemn as monopolization a regulated retailer's unilateral decision not to enter the wholesale market in order to subsidize the entry of a potential competitor which can readily obtain a supply at wholesale from an alternative source. This perversion of the "essential facilities" doctrine has, in the words of one of the dissenting judges below, "created a new rule of liability under Section 2"—a rule without support in this Court's decisions and in conflict with those of other courts of appeals.

In addition, in rejecting the applicability of the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny, the court of appeals has disregarded this Court's decision in *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), and violated fundamental principles of federalism by declining to follow a controlling

[7]In addition to the damage award, the district court granted Consolidated permanent mandatory injunctive relief, requiring City Gas to transport or sell natural gas to Consolidated at reasonable prices to be determined by the FPSC on application by Consolidated. To date, no such application has been made.

decision of the State's highest court on the interpretation of a Florida statute.

The court of appeals' decision in this case is unprecedented and in square conflict with holdings of other circuit courts of appeals. Moreover, it involves legal issues going to the essence of the offense of monopolization and implicating principles of federal-state accommodation at the heart of the state action doctrine. We respectfully submit that this Court should review the decision of the court of appeals to settle these important questions.

I

The Court Of Appeals Broke With Fundamental Antitrust Principles And Created A New Rule Of Liability For Monopolization Which Merits Review By This Court

The court of appeals held City Gas liable for monopolization under the so-called "essential facilities" doctrine, ruling that its refusal to supply Consolidated with wholesale natural gas at a price Consolidated found acceptable amounted to denial of access to an "essential facility" which Consolidated needed to compete in the retail market. That ruling, which is without precedent, distorts fundamental antitrust principles and threatens to stifle competition and undermine the efficacy of federal and state regulatory regimes throughout the Eleventh Circuit.

The decision below fastens monopolization liability on a company which: (1) has never made any sales in the relevant market and, hence, cannot possess monopoly power as a matter of law; and (2) does not control an "essential facility" because potential competitors like Consolidated can obtain a supply of wholesale natural gas from FGT simply by

complying with the conditions imposed by FERC. In such circumstances, liability for monopolization is not only legally insupportable but bizarre, as Chief Judge Tjoflat demonstrates in his lengthy and cogent dissent.

A. *There Was No Monopoly.* The court of appeals rested its holding on a manifestly erroneous and potentially mischievous premise: that City Gas, which has never made a sale at wholesale,[8] has "monopoly power in the wholesale market for the resale of natural gas." App. A-5. To our knowledge, that is the only decision in the one-hundred-year history of the Sherman Act in which a firm with a *0%* market share—a firm which is itself supplied by the only seller in the market—has been found to possess monopoly power in that market. As the court of appeals itself noted, FGT is the only wholesale supplier of natural gas in Florida and therefore has a 100% share of the wholesale market. App. A-2. As a matter of law, City Gas cannot conceivably have monopoly power in a market in which it has never sold. Absent such power, the judgment below cannot stand.[9]

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[8]As the court of appeals pointed out, City Gas at one time entered into a contract to sell gas to FGT's former retail affiliate, but no gas was ever sold under that agreement. App. A-5.

[9]Only the existence of monopoly power at the wholesale level can sustain the judgment below, because that is the level at which City Gas allegedly sought to charge a supracompetitive price. *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 29 (1st Cir. 1990). The holding below that City Gas has monopoly power in the retail market is equally unfounded. Monopoly power is "the power to control prices or exclude competition." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). City Gas lacks the power to control retail prices because its prices are controlled by the Florida Public Service Commission. Similarly, City Gas lacks the power to control the market price indirectly by reducing output because it is required by state law to serve all end-users who request service. Fla. Stat. § 366.03. And City Gas lacks the power to "exclude competition" from the retail market because entry is controlled by FERC, which has exclusive authority over the grant of natural gas allocations and the sale of wholesale natural gas by FGT.

It is settled antitrust doctrine that proof of monopoly power requires a showing that the putative monopolist has at least a substantial share of sales in the relevant market. In *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945), Judge Learned Hand wrote that a ninety percent share of the relevant market "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." Judge Hand's statement has been followed in countless decisions. *See, e.g., Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 30 (1st Cir. 1990) (market share of less than 12% was insufficient as a matter of law); *Barry v. Blue Cross of California*, 805 F.2d 866, 874 (9th Cir. 1986) (16% insufficient); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 261 (3d Cir. 1984) (32-35%), *cert. denied*, 471 U.S. 1016 (1985); *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 528-31 (5th Cir. 1982) (17% and 25%), *cert. denied*, 460 U.S. 1082 (1983). *See also United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956) (no monopoly power where defendant had less than 20% share of the relevant market).

By declaring City Gas a monopolist in a market in which it has never participated, the court of appeals not only generated a conflict among the circuits but committed a fundamental legal error which, if not reviewed and corrected by this Court, will undoubtedly skew application of the Sherman Act in the Eleventh Circuit.

B. *There Was No "Essential Facility."* In a flagrant misapplication of the "essential facilities" doctrine, the court of appeals found that City Gas' refusal to sell natural gas at wholesale to Consolidated at a price acceptable to respondent constituted an act of monopolization. The "essential facilities" doctrine—which derives from this Court's decisions in *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912), *Associated Press v. United States*, 326

U.S. 1 (1945), and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)—renders it unlawful for a monopolist to deny access to a facility or resource which it controls if access to that facility or resource is essential to another's ability to compete with the monopolist. *See, e.g., Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

Because it runs counter to fundamental competitive principles by requiring a firm to facilitate or subsidize its competitors' business, the "essential facilities" doctrine must be carefully circumscribed to avoid chilling legitimate competition under the guise of proscribing monopolization. "Liability for denying another access to one's goods, services, or facilities should be exceptional." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 736.2a at 762 (Supp. 1990). In applying the doctrine here, the court of appeals created a new and invidious rule of Section 2 liability by concluding that access to City Gas' pipeline was essential to Consolidated's ability to enter the retail market in the face of FERC's finding that Consolidated could feasibly enter the market with a supply from FGT. The decision below thus stands for the unprecedented and manifestly unsound proposition that a firm engaged exclusively in the retail sale of a commodity is obligated to enter the wholesale market and sell its product to a potential competitor in order to save that competitor a $250,000 expense imposed by the responsible federal regulatory authority as a condition of obtaining the product from the very wholesale source supplying the retailer.

1. *City Gas Is Not Vertically Integrated.* In the typical case, the "essential facilities" doctrine applies to refusals by a vertically integrated monopolist (or combination of vertically integrated sellers) to afford access to a product or service sold in one of two related markets served by the monopolist to firms which compete with it in

the other. *Terminal Railroad, Associated Press* and *Otter Tail* are illustrative. In each, the defendant or defendants were vertically integrated firms which used their monopoly position in an "upstream" market to disadvantage competitors in a "downstream" market. As Chief Judge Tjoflat pointedly observed in his dissent below, the doctrine deals with a form of "monopoly leveraging" and is designed to prohibit "a monopolist's extension of power from one stage of the market into another . . ." App. B-54. Where the defendant is not vertically integrated, there can be no such leveraging and no significant threat to competition.

It is undisputed that City Gas has never sold natural gas at wholesale and, thus, is not vertically integrated. With no position whatsoever—much less monopoly power—in the wholesale market, it cannot leverage control over wholesale distribution to disadvantage competition in the downstream retail market. By applying the "essential facilities" doctrine in such circumstances, the court of appeals severed the doctrine from its moorings and fashioned a rule of law which would unduly hinder a competitor's ability to compete by imposing on it unwarranted obligations to facilitate its competitors' entry.[10]

2. *City Gas' Pipelines Are Not "Essential."* Prior to the decisions below, courts applying the "essential facilities" doctrine have uniformly recognized that, as an exception to the general rule permitting firms—even monopolists—to choose those with whom they will do business, the doctrine requires a threshold showing that the facility in question is

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[10]The court of appeals does not cite this Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), in support of its rule of law. This is not surprising, as *Aspen Skiing* dealt with a very different circumstance—a monopolist's *withdrawal* of support from a competitor with whom it has long been dealing. As this Court explained, the decision condemned "a decision by a monopolist to make an important change in the character of the market." *Id.* at 604.

truly essential. "At the very least, a plaintiff must demonstrate that 'duplication of the facility would be economically infeasible' and that 'denial of its use inflicts a *severe handicap* on potential [or current] market entrants." *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990) (emphasis and bracketed material in original) (quoting *Hecht v. Pro-Football, Inc.*, 570 F.2d at 992).[11] The courts below disregarded this uniform authority and held that access to City Gas' pipeline was essential to Consolidated's ability to compete despite the fact that Consolidated could have obtained a supply of wholesale gas from FGT simply by making the one-time $250,000 payment to cover the cost of interconnection required by FERC after an allocation proceeding mandated by Congress. That holding not only distorts fundamental antitrust precepts but also disregards Congress' decision to subject entry into natural gas distribution to federal regulation.

The courts below deemed City Gas' supply of natural gas to be "essential" only because Consolidated wished to avoid two claimed obstacles to its entry into the retail market: (1) the estimated $250,000 cost of connecting its distribution system with FGT's wholesale pipeline, as required by FERC; and (2) the delay inherent in the federal regulatory approval process. Neither is sufficient to support the conclusion that City Gas' pipeline is an "essential facility."

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[11] *Accord, Directory Sales Mgt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612-13 (6th Cir. 1987) (control over white pages listings and telephone billing did not constitute essential facility where competitors could compete without it); *Fla. Cities v. Fla. Power & Light Co.*, 525 F. Supp. 1000, 1007 (S.D. Fla. 1981) (electric utility's generating units were not essential to competitor where "access [would] simply improve plaintiff's existing electricity sources" vis-a-vis defendant); *Robinson v. Magovern*, 521 F. Supp. 842, 913 (W.D. Pa. 1981) (existence of residency program and open-heart surgery facilities did not make hospital essential facility), *aff'd*, 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982).

By the district court's own reckoning, an investment of $250,000 represented less than a third of Consolidated's net worth and would have increased Consolidated's market value by some $1.5 million.[12] App. D-32-33. To impose on City Gas a duty to enter the wholesale market in order to save Consolidated an expense of $250,000 trivializes the notion of essentiality—particularly in light of the fact that the federal agency with responsibility for determining the need for new entry into the natural gas market found that entry by Consolidated with a supply from FGT was economically feasible.[13]

As for the second claimed obstacle, it was Congress, not City Gas, which determined that purchases of natural gas from interstate wholesalers should be federally regulated and limited to firms with FERC allocations. Even if the process of obtaining federal regulatory approval had been more onerous than it actually was—the process took only a little more than two years[14]—reliance on that process as a predicate for a finding of essentiality distorts the antitrust laws to circumvent congressional regulatory policy.

In short, the court of appeals' invocation of the "essential facilities" doctrine to force City Gas to become an involuntary wholesaler creates an unprecedented and

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[12]Thus, as Chief Judge Tjoflat demonstrates in his dissent below, Consolidated could easily have financed the $250,000 cost. App. B-42-44.

[13]By the same token, access to City Gas' pipeline for purposes of transporting gas purchased from FGT cannot be considered essential. The $250,000 cost imposed by FERC would have enabled Consolidated to connect directly to FGT's wholesale pipeline.

[14]While City Gas opposed Consolidated's application (along with FGT and Peoples), that intervention, and any delay it may have caused, are free from antitrust infirmity under *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny. The district court studiously avoided resting antitrust liability on City Gas' participation in the FERC proceedings. App. D-88-89.

potentially ruinous rule of antitrust liability completely at odds with this Court's decisions and those of other circuits. Judge Posner of the Seventh Circuit declared with some confidence four years ago that, notwithstanding the "essential facilities" doctrine: "[I]f a firm went to a monopolist and said, 'Please—for the sake of competition—give me a loan so I can compete with you and make this a competitive market,' and it was turned down, it could not invoke the Sherman Act." *Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). The Eleventh Circuit has now effectively held to the contrary. This Court should grant certiorari to resolve the confusion and uncertainty created by the court of appeals' ruling.

II

In Rejecting City Gas' State Action Defense, The Court Of Appeals Improperly Ignored A Holding Of The State Supreme Court On The Meaning Of A Florida Statute And Disregarded This Court's Precedents

The court of appeals held that neither the territorial agreement between City Gas and Peoples nor City Gas' refusal to sell at wholesale was entitled to the protection of the state action doctrine. In so ruling, the court misconstrued controlling decisions of this Court—principally *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985)—and, in the process, inexplicably disregarded a square holding of the Florida Supreme Court on the construction of the relevant Florida regulatory statute and its applicability to the very agreement at issue here. Those fundamental errors implicate principles of federalism at the very core of the state action doctrine and should be reviewed by this Court.

As crystallized in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 87, 105 (1980), the state action doctrine protects conduct otherwise proscribed by the Sherman Act if two conditions are satisfied: (1) the conduct is undertaken pursuant to a clearly articulated and affirmatively expressed state policy intended to replace competition with regulation; and (2) the conduct in question is actively supervised by the state. Both prongs of the *Midcal* test were misapplied below.

A. *Clear Articulation.* The court of appeals found that the City Gas-Peoples agreement was not entitled to state action immunity because of the absence of a clearly articulated state policy. Finding no Florida statute which expressly authorized the FPSC to approve territorial agreements between natural gas utilities, the court concluded, based on its own independent review of the Florida statutes, that "the [Florida] Legislature . . . did not intend for natural gas utilities to . . . enjoy exclusive territorial agreements." App. A-8.

1. *The court of appeals disregarded a controlling decision of the state's highest court.* The Florida Supreme Court has squarely ruled to the contrary. In *City Gas Co. v. Peoples Gas Sys., Inc.*, 182 So.2d 429, 436 (Fla. 1965), a case concerning *this very agreement*, the State's highest court held that "the commission has adequate implied authority under Ch. 366 to validate such agreements as the one before us."[15] The Eleventh Circuit felt free to disregard the state

[15]Although the Florida Supreme Court's decision in *City Gas* predated the 1974 amendment giving the FPSC explicit authority over territorial agreements between electric utilities, the state court has recently made it clear that *City Gas* is still good law. *See Fla. Public Service Comm'n v. Fuller*, 551 So.2d 1210, 1212 (Fla. 1989) ("the PSC has had the implicit power to approve and to modify territorial agreements since before the parties executed the instant agreement [1967]") (citing *City Gas*). Fla. Stat. § 366.04 has recently been amended to make explicit

(Footnote continued on next page)

Supreme Court's interpretation of the Florida statutes because the issue of "clear articulation" is "ultimately a question of federal antitrust law." App. A-10 (emphasis removed).

To be sure, application of the *Midcal* test is ultimately governed by federal law. But that unremarkable fact does not give the federal judiciary authority to interpret a state statute in a manner contrary to the holdings of the state courts. The Sherman Act, like the due process clause, does "not take up the laws of the several states and make all questions pertaining to them [federal] questions, nor does it enable [a federal] court to revise the decisions of the state courts upon questions of state law." *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 166 (1916). As this Court observed in *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6 (1987) (quoting *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974)), a case raising the very same issue involved here: "We may not 'construe a state statute contrary to the construction given to it by the highest court of a State.'"

The court of appeals' conclusion that it was free to disregard an authoritative ruling of Florida's highest court on the interpretation of Florida statutes conflicts with innumerable decisions of this Court[16] and with the views

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(Footnote continued from previous page)
the FPSC's authority to approve territorial agreements between natural gas utilities, apparently in response to the decisions of the lower courts in this case. 1989 Fla. Laws ch. 89-292.

[16]*See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 n.9 (1978); *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974); *NAACP v. Button* 371 U.S. 415, 432 (1963); *Cramp v Bd. of Public Instruction*, 368 U.S. 278, 235 (1961); *Garner v. Louisiana*, 368 U.S. 157, 166 (1961); *Albertson v. Millard*, 345 U.S. 242, 244 (1953); *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'ers*, 332 U.S. 495, 499-500 (1947); *Hebert v. Louisiana*, 272 U.S. 312, 316-17
(Footnote continued on next page)

expressed by every other circuit court of appeals to have considered the issue in the context of the state action doctrine."[11] The Florida Supreme Court's ruling in *City Gas* "put[] these words in the statute as definitely as if it had been so amended by the legislature." *Winters v. New York*, 333 U.S. 507, 514 (1948). This Court should grant certiorari to insure that federal courts do not impinge on the long-settled right of state courts to have the final word on the content of state law.

2. *The court of appeals disregarded dispositive holdings of this Court.* In *Southern Motor Carriers*, this

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(Footnote continued from previous page)
(1926); *Supreme Lodge v. Meyer*, 265 U.S. 30, 32 (1924); *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 166 (1916).

[11] *See Oberndorf v. City and County of Denver*, 900 F.2d 1434, 1438-39 (10th Cir.) (following Colorado court decisions), *cert. denied*, 111 S. Ct. 129 (1990); *Consolidated Television Cable Service, Inc. v. City of Frankfort, Ky.*, 857 F.2d 354, 361 (6th Cir. 1988) (following "'authoritative interpretation'" of state regulatory statute by state supreme court), *cert. denied*, 109 S. Ct. 1537 (1989); *Campbell v. City of Chicago*, 823 F.2d 1182, 1184 (7th Cir. 1987) ("the Illinois cases that have determined the legislature's intent in enacting § 11-42-6 further convince us that the City's actions were authorized"); *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1433-34 (9th Cir. 1984) ("We are convinced that the California Supreme Court will hold taxicabs are within the coverage of the . . . Act"), *cert. denied*, 471 U.S. 1003 (1985); *Central Iowa Refuse Sys., Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 427 n.15 (8th Cir. 1983) (following decision of Iowa Supreme Court), *cert. denied*, 471 U.S. 1003 (1985); *City of North Olmstead v. Greater Cleveland Regional Transit Authority*, 722 F.2d 1284, 1288 (6th Cir. 1983) (following Ohio court decisions), *cert. denied*, 467 U.S. 1205 (1984); *Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F.2d 805, 810-11 (10th Cir. 1982) (following Colorado Supreme Court decisions), *cert. denied*, 459 U.S. 1126 (1983); *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 994 n.4 (3d Cir.) ("We are . . . bound by the Pennsylvania Supreme Court's holding that the Horse Racing Commission was authorized by the legislature to fix jockey fees"), *cert. denied*, 459 U.S. 1022 (1982); *Community Builders, Inc. v. City of Phoenix*, 652 F.2d 823, 829 (9th Cir. 1981) (following Arizona Supreme Court decision).

Court held that a Mississippi statute generally providing for rate regulation of intrastate trucking services by the Mississippi Public Service Commission, coupled with the Commission's approval of the particular conduct challenged on antitrust grounds, were sufficient to satisfy the first prong of the *Midcal* test. "As long as the state as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." 471 U.S. at 64.

Even apart from its rejection of the Florida Supreme Court's construction of Florida's statutes, the court of appeals' holding that the City Gas-Peoples agreement failed the *Midcal* test squarely conflicts with *Southern Motor Carriers*. Like the Mississippi Public Service Commission, the FPSC "is not authorized to choose free-market competition," but "is required to prescribe rates for [public utilities] on the basis of statutorily enumerated factors." 471 U.S. at 65 n.25. *See* Fla. Stat. §§ 366.041 and 366.06. And like the conduct of the Mississippi truckers in *Southern Motor Carriers*, the territorial agreement between City Gas and Peoples was encouraged and formally approved by the state public service commission pursuant to its regulatory authority. App. I. The two cases are indistinguishable.[18]

Although the court of appeals remarkably neglected even to address City Gas' state action defense with respect to the refusal to sell at wholesale—even though the issue was extensively briefed—that aspect of the holding below is also

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[18]Indeed, in one respect this is an easier case than *Southern Motor Carriers*. Once the City Gas-Peoples agreement was approved by the FPSC, it became "an order of the commission, binding as such upon the parties." *City Gas*, 182 So.2d at 436. *See also Fla. Public Service Comm'n v. Fuller*, 551 So.2d at 1212 ("Any modification of termination of [an]order [approving a territorial agreement] must first be made by the PSC"). The court of appeals' decision thus creates a direct and unavoidable conflict between City Gas' obligations under federal antitrust law and its obligations under state regulatory law.

controlled by *Southern Motor Carriers*. Fla. Stat. § 366.03 expressly provides that "[n]o public utility shall be required to furnish . . . gas for resale . . ." Like the North Carolina, Georgia and Tennessee statutes considered in *Southern Motor Carriers*, this statute "explicitly permit[s]" the precise conduct for which City Gas has been found liable and thereby satisfies the first prong of the *Midcal* test. 471 U.S. at 63.

B. *Active Supervision.* The decision below is equally inconsistent with settled state action principles on the second prong of the *Midcal* test. The court of appeals held—explicitly in the case of the territorial agreement, and implicitly in the case of the refusal to deal—that the conduct for which City Gas has been found liable is not sufficiently supervised by the State of Florida to satisfy *Midcal*'s "active supervision" standard. Both holdings are inconsistent with the principles articulated by this Court and with the holdings of other circuits.

To satisfy the active supervision requirement, the state must exercise "ultimate control over challenged anticompetitive conduct." *Patrick v. Burget*, 108 S. Ct. 1658, 1663 (1988). That is, "state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.*

With respect to the territorial agreement, it would be difficult to conceive of greater supervision. The precise agreement at issue was formally submitted to and expressly approved by the FPSC and would have been void and unenforceable as a matter of state law without that approval. *City Gas*, 182 So.2d at 436. It has been reviewed at regular intervals since that time. *See* FPSC Orders Nos. 3736 (1965), 5495 (1972) and 5800 (1973). And it is subject to rejection or modification at any time as part of the Commission's

ongoing regulatory jurisdiction over every aspect of the operations of retail natural gas distributors in Florida.[19]

The court of appeals' decision that this apparatus was insufficient to satisfy the supervision requirement of the *Midcal* test conflicts with decisions by other circuits finding the requirement satisfied on far less. *See New England Motor Rate Bureau, Inc. v. Federal Trade Comm'n*, 908 F.2d 1064 (1st Cir. 1990) (active supervision requirement was satisfied by Massachusetts regulatory agency's review of proposed trucking rates, even though rate tariffs submitted to agency automatically took effect in 30 days unless disallowed by commission and commission had never convened a hearing on, and had never disallowed, such a tariff); *Fuchs v. Rural Elec. Convenience Cooperative, Inc.*, 858 F.2d 1210, 1218 (7th Cir. 1988) (territorial agreement between electric utilities was adequately supervised where it was initially approved by state regulator and both parties were subject to ongoing regulatory supervision), *cert. denied*, 109 S. Ct. 1744 (1989); *United States v. Southern Motor*

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[19]Moreover, Commission decisions approving or rejecting proposed territorial agreements are subject to judicial review by the state supreme court. The state constitution and statutes have provided for judicial review of Commission decisions on territorial agreements since the Commission was created in its present form in 1951; since 1980, that review has been by direct, mandatory appeal to the Florida Supreme Court. *See* Fla. Stat. §§ 350.128, 366.10; *Utilities Comm'n of New Smyrna Beach v. Fla. Public Service Comm'n*, 469 So.2d 731 (Fla. 1985) (review by direct appeal); *Peoples Gas Sys., Inc. v. Mason*, 187 So.2d 335 (Fla. 1966) (review by certiorari); *Storey v. Mayo*, 217 So.2d 304 (Fla. 1968) (same), *cert. denied*, 395 U.S. 909 (1969). The Florida Supreme Court's task in such cases is to "decide whether the subject agreement is invalid as being in restraint of trade, contrary to the public interest, or violative of equal protection requirements." *Storey v. Mayo*, 217 So.2d at 306. *Cf. Patrick v. Burget*, 108 S. Ct. 1658, 1664-65 (1988) (Oregon courts did not adequately supervise physician peer-review decisions where no Oregon statute provided for judicial review of such decisions and, even if the Oregon courts were to provide such review, it would not go to the merits of the decision).

Carriers Rate Conference, 702 F.2d 532, 539 & n.12 (5th Cir. Unit B 1983) (en banc) (collective ratemaking was adequately supervised by state regulatory commissions, even though rates took effect absent agency action, where agencies reviewed tariffs and "routinely suspend[ed] their effectiveness"), *rev'd on other grounds*, 471 U.S. 48 (1985).

As for the refusal to sell at wholesale, this Court's reasoning in *Patrick* recognizes that the adequacy of state supervision depends on the content of state policy. *See* 108 S. Ct. at 1663 (supervision is needed to insure "that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests"). The state policy expressed in section 366.03 is simply to give public utilities discretion as to whether or not to provide electricity or natural gas for resale. No Florida regulator or other official, consonant with section 366.03, could disapprove a utility's decision to decline to furnish electricity or gas for resale, for such "disapproval" would necessarily violate the very policy mandated by section 366.03.[20] Since Florida's policy goes no further than to leave a particular decision to the utility, the utility's decision as to whether or not to provide service for resale cannot fail to accord with state policy. Under these circumstances, there is nothing for the state to supervise. *See* Areeda & Hovenkamp, *supra*, ¶ 212.7 at 186 (where a statute "leaves

[20]On the other hand, if the utility *elects* to provide service for resale, the terms and conditions of such a sale must be approved by the FPSC. Fla. Admin. Code r. 25-9.034. In exactly the same way, the regulators in *Southern Motor Carriers* exercised adequate supervision not by reviewing the decision to engage in collective ratemaking in the first instance—which was entirely up to the utility—but by reviewing the results of such ratemaking if the utility elected to do so.

little or nothing to supervise," no further supervision is required).[21]

The state supervision requirement "serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985). Florida's regulation of natural gas utilities is pervasive, encompassing the rates, services, service areas and every other aspect of the business of natural gas companies operating in the state. That regulatory control satisfies the concerns underlying the state supervision requirement of the *Midcal* test. In the balanced federal system which the state action doctrine is designed to accommodate, states must be free to adopt schemes which permit regulated utilities to pursue what might otherwise be anticompetitive conduct, protecting the public by regulatory means. The decision below, if not corrected by this Court, threatens to stifle the states' ability to adopt regulatory regimes for public energy utilities without subjecting those utilities to federal antitrust liability.

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[21]"This is not a case in which Florida has purported to "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker v. Brown*, 317 U.S. 341, 351 (1943). By creating a broad and pervasive regulatory scheme administered by the FPSC, the state has ensured that public utilities cannot engage in unsupervised private conduct free of any restrictions imposed either by the Sherman Act or by the state. *See* I P. Areeda & D. Turner, *Antitrust Law* ¶ 212c at 70-71 (1978). Within such a system, it is not necessary for the state to supervise the particular conduct challenged in an antitrust action when doing so is unnecessary to further the relevant state policy.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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NO.

in the Supreme Court of the United States

October Term, 1990

CITY GAS COMPANY OF FLORIDA,

Petitioner,

vs.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

APPENDIX A

United States Court of Appeals,
Eleventh Circuit.

Aug. 10, 1989.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC., Plaintiff-Appellee,

v.

CITY GAS COMPANY OF FLORIDA,
A Florida Corporation,
Defendant-Appellant.

No. 87-6108.

* * *

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, Chief Judge, COX, Circuit Judge, and MORGAN, Senior Circuit Judge.

RONEY, Chief Judge:

City Gas Company of Florida appeals from a $4.76 million dollar judgment entered against it after the district court found City Gas violated federal antitrust laws by agreeing with another Dade County natural gas supplier not to compete in each other's territory, and by refusing to deal with appellee Consolidated Gas Company in its effort to convert from retail sales of liquid petroleum gas to natural gas. We affirm, essentially for the reasons stated in the district court's extremely thorough opinion. *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 665 F.Supp. 1493 (S.D.Fla.1987).

The district court's opinion contains a complete recitation of the facts and procedural history of this case. Only a brief recount is necessary here.

Consolidated Gas began business in 1957 as a retail supplier of liquid petroleum (LP) gas to the home and businesses of the Bel Aire/Point Royale subdivision in southern Dade County. Appellant City Gas is essentially the only retail supplier of natural gas in its service area, which includes this subdivision. By March 1982, Consolidated determined it needed to convert to natural gas to survive in the marketplace, because rising oil costs had caused the retail cost of LP gas, which is derived from oil, to nearly double the retail cost of natural gas.

Consolidated applied for an allocation from the Federal Energy Regulatory Commission (FERC) and asked that it order the Florida Gas Transmission Company (FGT), the State's only wholesale pipeline supplier of natural gas, to provide and construct a new delivery point to connect FGT's facilities with those of Consolidated and to sell Consolidated all of its required natural gas.

FGT opposed the application contending that less costly alternatives were available, such as allowing City Gas to sell gas to the subdivision, and that its tariff required Consolidated to bear the cost of constructing a pipeline. Peoples Gas System intervened and objected to Consolidated's application, because it feared that if the application were granted it might diminish the supply of natural gas to FGT's existing customers which included Peoples. City Gas also intervened and objected on the same grounds.

Consolidated then explored the possibility of using City Gas' pipes to transport gas purchased from FGT or of buying gas directly from City Gas. During the FERC proceedings, City Gas indicated it would sell gas to Consolidated but the parties never came to an agreement on terms. Consolidated then sought an injunction to prevent City Gas from extending its pipelines any further into Consolidated's territory, recognizing that City Gas already had begun delivering gas to some customers within the

subdivision. Although the state circuit court granted a preliminary injunction, it was later dissolved when the court ruled that Consolidated's so-called exclusive easements granting it the right to be the sole provider of gas to the subdivision could not be enforced as against public policy. This ruling was affirmed on appeal, although on slightly different grounds. *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 447 So.2d 351 (Fla. 3d DCA), *rev. denied*, 456 So.2d 1181 (Fla. 1984).

During this time, Consolidated and City Gas also engaged in unsuccessful negotiations for the purchase of Consolidated's assets by City Gas. When this also failed, Consolidated sued in federal district court alleging that City Gas had engaged in exclusionary conduct in violation of federal antitrust laws on a variety of grounds.

After a bench trial, the district court found in favor of Consolidated on its monopolization claim, holding that section 2 of the Sherman Act was violated by Consolidated's territorial agreement with Peoples Gas, its only real competitor in South Florida, and that the City Gas offer to sell gas to Consolidated at an unreasonably high price amounted to a refusal to deal, also in violation of the Act. Compensatory damages were determined to be $1,587,065, which when trebled pursuant to section 4 of the Clayton Act, 15 U.S.C.A. § 15(a), amounted to $4.76 million.

The district court ordered City Gas to sell or transport natural gas to Consolidated at a reasonable price. The court rejected City Gas' counterclaim in which it alleged antitrust violations by Consolidated in its development of a subdivision where the deeds covenanted that gas would be purchased only from it.

City Gas does not challenge the factual findings made by the district court, but rather appeals the legal principles applied to those facts. City Gas first contends that it does not have the monopoly power to "control prices or exclude

competition," because it is a regulated industry, whose rates and competitors are governed by the Florida Public Service Commission. It argues that it cannot violate section 2 of the Sherman Act, because under the Florida statutes and case law, the power to control prices and determine the degree of competition in the natural gas industry in Florida is lodged exclusively in the Florida Public Service Commission. City Gas has no power to determine its own prices, much less the market price of natural gas. It likewise lacks the power to exclude competition. It follows, the argument goes, that City Gas is not a monopolist.

The district court properly dealt with this argument. The mere fact that City Gas is regulated does not automatically exempt it from compliance with federal antitrust provisions. "Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372, 93 S.Ct. 1022, 1027, 35 L.Ed.2d 359 (1973). The natural gas industry is subject to antitrust legislation. *See Southern Louisiana Area Rate Cases v. Federal Power Comm'n*, 428 F.2d 407, 442 n. 112 (5th Cir.), *cert. denied*, 400 U.S. 950, 91 S.Ct. 243, 27 L.Ed.2d 257 (1970).

As the district court stated, however, the presence of a system of regulation does diminish the effectiveness of one of the analytical tools frequently used by the courts in determining the existence of monopoly power, that is, a presumption that monopoly power exists if the market share enjoyed by the particular defendant exceeds 70 to 80 percent. In a regulated industry, "[a] predominate market share may merely be the result of regulation, and regulatory control may preclude the exercise of monopoly power." *Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, 740 F.2d 980, 1000 (D.C.Cir. 1984), *cert. denied*, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985). Thus, the entire regulatory scheme must be examined to determine

whether a defendant, although regulated, still retained power to control prices or restrict entry into the market. *Id.* at 1001.

The district court first found that City Gas had monopoly power in the wholesale market for the resale of natural gas. It found that, like AT & T in *Southern Pacific*, the procedure was for City Gas to propose the rates at which it desires to sell gas, obtain an agreement with the buyer company, and then submit the agreement to the Commission for its approval. The court observed that because the Florida statute provides that natural gas utilities are not *required* to resell gas, it is "unclear" whether the Commission could compel City Gas to sell at any particular rate, although certainly it could withhold approval of a rate proposed by City Gas. The district court noted that FERC, which is the federal regulator of wholesale natural gas, does not control intrastate sales of natural gas and that City Gas therefore was "able to resell gas at will, essentially without regulatory intervention." 665 F.Supp. at 1520.

City Gas, although not disputing its authority to sell gas for resale, nevertheless argues that it has never done so and thus cannot be found to have monopoly power in the wholesale market. City Gas had, in fact, entered into a contract with a third party to sell its gas for resale, but no gas was ever actually sold under this agreement. The rather fortuitous circumstance, however, that City Gas never actually sold any gas under this agreement does not obscure the fact that it had the *power* to do so so. The district court was not clearly erroneous in finding that City Gas had monopoly power in the wholesale market.

Nor did the court err in its conclusion that City Gas also possessed monopoly in the retail market. City Gas asserts that the fact that its rates are regulated by the Commission is dispositive of the monopoly issue. Yet, as the district court found, although the Commission must approve the rates at which natural gas is sold, it has allowed widely differing

prices—proposed by the utility—with no apparent reason for the price difference. Thus, although the rates are subject to approval, there seems to be considerable authority vested in the utility to set the prices at which it will do business. The district court was not clearly erroneous in finding that this amounts to monopoly power.

Finally, there are high entry and exit barriers to this industry, which also lend support here to a finding of monopoly power. We reject City Gas' contention that because the barriers are not of its own making, but the result of the Commission regulation and the economic realities of a capital intensive industry, it does not have monopoly power. As the district court noted, the "defendant's innocence or blame-worthiness, however, has absolutely nothing to do with whether a condition constitutes a barrier to entry." *Southern Pacific Communications Co.*, 740 F.2d at 1001. Because of the high entry barriers, City Gas' presence in the industry and its ownership of the massive system of pipes, an essential facility, it clearly has the power to exclude competition.

Of course, whether it exercises this power improperly is a distinct question. City Gas does not directly address this issue, arguing first a lack of monopoly power and then immunity under the state action doctrine. We nevertheless briefly discuss the district court's findings.

It is true that a regulated utility possesses a lawful, natural monopoly simply by virtue of the regulation. It remains accountable for abuse of that power, however, by engaging in anticompetitive conduct. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377, 93 S.Ct. 1022, 1029, 35 L.Ed.2d 359 (1973) (holding that regulated utility's use of monopoly power to "foreclose competition or gain a competitive advantage, or to destroy a competitor" violated antitrust laws); *see Continental Cablevision of Ohio, Inc. v. American Elec. Power Co.*, 715 F.2d 1115, 1120–21 (6th Cir.1983) (defendant electric utility with "lawful monopoly"

not shown to have engaged in anticompetitive conduct in suit by cable television companies challenging very high rates for use of utility's poles). Pervasive regulation will not protect an industry from antitrust liability for "conduct that is voluntarily initiated." *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1103 (7th Cir.), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983).

Conduct that would otherwise violate federal antitrust laws may nevertheless be permissible when done under the aegis of the State. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). For private conduct to qualify for immunity under the state action doctrine, the challenged restraint must be (1) " 'one clearly articulated and affirmatively expressed as state policy,' " and (2) "the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980) (citation omitted.)

City Gas challenges only the district court's determination that it is not immune from antitrust liability for its territorial agreement with Peoples and its refusal to deal with Consolidated. This is the holding which amicus curiae briefs from electrical utilities have addressed. Indeed, the Florida Public Service Commission has filed a brief which asked that the holding in this case "be modified to clearly indicate that telephone, electric, and water and sewer utilities regulated by the Florida Public Service Commission are exempt from Sherman Antitrust provisions based on the explicit grant of legislative authority to designate exclusive service territories." Although we cannot hold that such utilities are exempt, because no case or controversy is before us, we do hold that this decision should not in any way be read to cast doubt on the proposition argued by the electric company and the Florida Public Service Commission briefs. Indeed, the analysis which leads to the conclusion that

natural gas companies are not so protected is based on the statutes which do give such control to electric and other utility companies.

As the district court concluded, Chapter 366 of the Florida Statutes demonstrates that the Legislature "intended to substitute competition between public utilities for a regulatory program which would include foreseeable anticompetitive effects." The statute need not explicitly state what conduct is and is not permissible in order for that conduct to be undertaken pursuant to a clearly articulated state policy. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 63–64, 105 S.Ct. 1721, 1730–31, 85 L.Ed.2d 36 (1985) (specific authority to allow collective ratemaking not necessary because legislature intended that rates would be set by regulatory agency and collective ratemaking just one aspect of ratesetting process).

Were the statutes silent with respect to exclusive territorial agreements, perhaps there would be some merit to City Gas' argument that the authority granted to the Commission in Fla.Stat. § 366.02 to "prescribe fair and reasonable rates and charges" includes the power to approve territorial agreements. The statutes are not silent, however. Indeed, elsewhere in Chapter 366 the Legislature *expressly* granted the Commission the authority to approve territorial agreements among electrical utilities. Further, Chapters 364 and 367 provide explicit authority for the Commission to establish the territories in which telephone companies and water and sewer utilities may operate. This seems to us to be compelling evidence that the Legislature in fact did not intend for natural gas utilities to also enjoy exclusive territorial agreements.

City Gas argues that despite the differing statutory language, the territorial agreement was entered into pursuant to a clearly articulated state policy within the first prong of the *Midcal* test, because the Florida Supreme Court interpreted the precise agreement at issue here and

concluded the Commission had the authority to approve it. *City Gas Co. v. Peoples Gas Syst.*, 182 So.2d 429 (Fla.1965). Notably, City Gas argued there that this agreement, which Peoples accused it of breaking, should not be enforced, because it violated both the Sherman Act and state antitrust laws. The Florida Supreme Court did not address the potential Sherman Act violation, and held that territorial agreements, with or without Commission approval, did not violate state antitrust laws but were valid under Chapter 366 only with Commission approval. Otherwise, the court reasoned, the territorial agreements would conflict with the Commission's statutory power to require additions and extensions to plants and equipment for service needs.

The district court dismissed this decision, concluding that "[s]tate supreme court authority, however, does not form the basis for a clearly articulated state policy except when the court acts in its legislative capacity." 665 F.Supp. at 1530. The district court was incorrect to deem this decision irrelevant because it found the supreme court to be acting in its judicial capacity. This legislative/judicial distinction between decisions of a state supreme court is only meaningful, however, when the issue is whether the conduct in question is that of the State itself, and thus exempt from antitrust liability. *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct.1989, 80 L.Ed.2d 590 (1984). Then, action by a supreme court only in its legislative capacity is deemed to be that of the State. The clearly articulated test does not come into play except when the conduct of a private actor is challenged. When examining whether private conduct is immune pursuant to a clearly articulated state policy, it is proper to look to state supreme court constructions of the relevant statutes. *See, e.g., Consolidated Television Cable Service, Inc. v. City of Frankfort, Ky.*, 857 F.2d 354 (6th Cir.1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1537, 103 L.Ed.2d 842 (1989).

The existence of a state decision on the subject does not end the inquiry, however, because the determination of whether the first prong of *Midcal* is satisfied is ultimately a question of *federal* antitrust law. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44, 105 S.Ct. 1713, 1719, 85 L.Ed.2d 24 (1985); *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F.Supp. 892, 907 n. 16 (D.Md.1985), *affd*, 786 F.2d 202 (4th Cir.1986). The district court here did not rely solely on the statutory language. It also looked to the Commission's own expression of doubt as recently as 1985 as to its authority to establish exclusive territories or to resolve territorial disputes between natural gas utilities. *In re: Tariff filed by Miller Gas*, 85 FPSC 10:205 at 5–6 (October 18, 1985). It also noted that during the initial investigation of this precise agreement at issue here, City Gas contended to the Commission that the agreement was invalid under federal antitrust law and the Commission should not force City Gas to continue to adhere to it. 656 F.Supp. at 1530. In light of the clear statutory grant of exclusive territories for other utilities, the absence of that authority for territorial agreements for natural gas utilities, and the uncertainty with which the Commission has approached these agreements, the district court did not err in concluding that no *clearly* articulated state policy authorized this agreement.

Even if the first prong of the *Midcal* test was satisfied, which it was not, the territorial agreement would also have to be actively supervised by the State to qualify for immunity. Active supervision

> requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Patrick v. Burget, 486 U.S. 94, 108 S.Ct. 1658, 1663, 100 L.Ed.2d 83 (1988). That the Commission has expressed doubt about its authority to either establish exclusive agreements or to resolve disputes between natural gas utilities, unlike its express authority to do so for electric utilities, does not demonstrate to this Court that the Commission felt confident it could "disapprove [agreements] that fail to accord with state policy." *Id.* The district court stated there was no evidence that the Commission had created any standards for the creation of territorial agreements or required that they be reviewed on a regular basis. In fact, it appears that this agreement between City Gas and Peoples is the only territorial agreement between natural gas utilities in Florida. The cases dealing with Commission action in connection with *electric* utilities are unpersuasive in light of the explicit statutory authority vested in the Commission to regulate exclusive territories for those utilities.

There is no authority to support the argument that judicial review of Commission decisions in this situation supplies the necessary active supervision prong. Simply because the Commission has on occasion, some 15 to 25 years ago, looked at this agreement does not automatically immunize it from federal antitrust scrutiny. The "mere presence of some state involvement or monitoring does not suffice." *Patrick*, 108 S.Ct. at 1663. Rather, the Supreme Court has consistently contemplated a more vigorous, probing supervision than mere acquiescence. This is at bottom an agreement entered into by private parties, in pursuit of their own economic interests, that is neither authorized by the State, nor closely monitored by it. The minimal contact the Commission has had with this agreement is nothing more than a "gauzy cloak of state involvement" which does not protect it from the constraints of federal antitrust regulation. *Midcal*, 446 U.S. at 106, 100 S.Ct. at 943.

The district court found that City Gas abused its power by the following six acts.

1. By agreeing in 1960 with Peoples Gas not to compete with each other in their respective territories in the sale of natural gas.

2. By refusing to sell or transport natural gas to Consolidated at a reasonable price.

3. By attempting to purchase Consolidated and eliminate it as a potential competitor.

4. By acquiring two other small competitors.

5. By intervening in and opposing Consolidated's FERC allocation proceedings seeking permission to sell natural gas.

6. By not charging Consolidated's customers the usual "contribution in aid of construction" to extend service to them in an effort to lure Consolidated's customers away.

The court found that the first three acts were the primary instances of anticompetitive conduct, but stated that the last three, when viewed with the principal acts, further evidenced City Gas' intent to monopolize. These are anticompetitive acts which demonstrate an intent by City Gas to exercise monopoly power. The district court properly held that City Gas was not protected from the antitrust consequences of these acts.

City Gas argues that Consolidated obtained a double recovery when the district court ordered both money damages and injunctive relief. The court determined that Consolidated had been damaged in the amount of $1.58 million, a figure representing lost past profits and diminution in value as a going concern as a result of City Gas' anticompetitive conduct. What City Gas objects to is the court setting Consolidated's market value at the level of

City Gas' prior purchase offer for Consolidated's assets, arguing that this price represents Consolidated's value as an LP distributor, and not the value of Consolidated as a natural gas retailer. By setting the value in this manner, the court artificially inflated the loss suffered by Consolidated, City Gas contends. City Gas asserts that because of the injunctive relief, Consolidated will be able to sell natural gas and its present value is thus much more.

There has been no error in the computation of damages. Injunctive relief that became effective in 1988 does not restore Consolidated to the position it would have been in had Consolidated had access to natural gas in 1982, when City Gas engaged in its illegal conduct. In fact, an expert for Consolidated testified that had Consolidated obtained access to natural gas in 1982, its value at trial would have exceeded $2.2 million. The damage award is designed to compensate Consolidated for City Gas' past illegal conduct. By contrast, the injunctive relief is prospective to ensure that City Gas no longer engages in its anticompetitive behavior with Consolidated.

City Gas alleged by way of counterclaim that Consolidated, whose owners developed the Bel Aire/Point Royale subdivision through another corporation they headed, engaged in violations of the Sherman and Clayton acts by forcing buyers there to agree to purchase LP gas from it as a condition to buying their homes. The district court first rejected the Clayton Act claim, because the alleged tying arrangement involved land, not a commodity, and so was not governed by the Clayton Act. City Gas does not dispute this finding on appeal.

The district court properly rejected the Sherman Act claim finding that City Gas failed to establish that Consolidated had sufficient economic power in the real estate market so as to restrain trade in the gas market. *See Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 375 (5th Cir.1977) ("tying violation only

if the seller has sufficient economic power with respect to the tying product appreciably to restrain free competition in the market for the tied product.").

The district court did not err when it concluded that City Gas failed to establish that it was injured by any allegedly illegal conduct of Consolidated. Indeed, the record supports the district court's conclusion that City Gas was never precluded from selling gas in the subdivision, and that once it decided in 1982 that it was feasible to provide service to this area, it immediately extended its pipelines and began soliciting Consolidated's customers. There can be no antitrust violation without injury. *See Amey, Inc. v. Gulf Abstract and Title, Inc.*, 758 F.2d 1486, 1496–97 (11th Cir.1985), *cert. denied*, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed.2d 912 (1986); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705 (11th Cir.1984).

The decision of the district court is

AFFIRMED.

Appendix B

APPENDIX B

CONSOLIDATED GAS COMPANY OF FLORIDA, INC., Plaintiff-Appellee,

v.

CITY GAS COMPANY OF FLORIDA, A Florida Corporation, Defendant-Appellant.

No. 87-6108.

United States Court of Appeals, Eleventh Circuit.

Sept. 19, 1990.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, FAY, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, EDMONDSON, COX, Circuit Judges, MORGAN and RONEY, Senior Circuit Judges.*

PER CURIAM:

City Gas Company of Florida appealed from a $4.76 million judgment entered against it after the district court found that City Gas had violated federal antitrust laws. *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 665 F.Supp. 1493 (S.D.Fla.1987). A panel of this court affirmed. *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 880 F.2d 297 (11th Cir.1989). A majority of the active judges in regular active service ordered that the appeal be reheard by the court of appeals en banc. This order vacated the panel

*Circuit Judges Thomas A. Clark and Stanley F. Birch did not participate in this decision. Senior Circuit Judges Lewis R. Morgan and Paul H. Roney elected to participate in this decision, pursuant to 28 U.S.C.A. § 46(c).

opinion. *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 889 F.2d 264 (11th Cir.1989).

Having considered the briefs and heard oral argument in the case en banc, the court now reinstates the panel's opinion reported at 880 F.2d 297, affirming the judgment of the district court.**

AFFIRMED.

JOHNSON, Circuit Judge, concurring in part and dissenting in part in which KRAVITCH, Circuit Judge, joins:

While I concur in the Court's opinion that City Gas Company of Florida refused to deal in violation of section 2 of the Sherman Act, 15 U.S.C.A. § 2 ("section 2"), I am constrained to dissent from the Court's holding that the territorial agreement between City Gas and Peoples Gas Systems, Inc. ("Peoples") is not immune from section 2 liability under the state action doctrine.

I. FACTS

A. *Background*

City Gas is a major distributor of natural gas in southern Florida. City Gas purchases natural gas from Florida Gas Transmission Company ("FGT").[1] City Gas then distributes the gas to its approximately 100,000 customers through a network of pipes. City Gas and Peoples are the two largest natural gas utilities in Florida. Both entered the natural gas business in 1960, when they applied for and received allocations (i.e., permits) from the Federal

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**Judges Johnson and Kravitch, concurring in part and dissenting in part, concur in affirmance of the judgment of the district court. Thus, a majority of seven judges agrees to affirm the judgment of the district court.

[1]FGT operates the only pipeline transporting natural gas into Florida.

Energy Regulatory Commission ("FERC") to purchase and resell natural gas from FGT.[2]

After a brief period of competition for customers, City Gas and Peoples entered into an agreement not to compete ("the territorial agreement"). The territorial agreement provided each party with a service area where the other would not solicit customers. City Gas and Peoples submitted the territorial agreement to the Florida Public Service Commission ("FPSC"),[3] and on November 9, 1960, the FPSC entered an order stating:

> It is our opinion that territorial agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities which invariably accompany expansion into areas already served by a competing utility, are definitely in the public interest and should be encouraged and approved by an agency such as this, which is charged with the duty of regulating public utilities in the public interest.

Florida Railroad and Public Utilities Commission, Order No. 3051 (November 9, 1960) [hereinafter *"Order"*].

Chapter 366 of the Florida Statutes ("chapter 366") empowers the FPSC "to regulate and supervise each public utility with respect to its rates and service and the issuance and sale of its securities." Fla. Stat.Ann. § 366.04.[4] In fixing

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[2]The natural gas industry in Florida is regulated by the FERC and the Florida Public Service Commission ("FPSC"). At the federal level, the FERC regulates the wellhead cost of natural gas (i.e., cost from the producer to the wholesaler) and the wholesale price paid by retail distributors such as City Gas. At the state level, the FPSC regulates the retail rates charged by distributors such as City Gas. Retail rates are determined through a process known as a "rate case."

[3]The FPSC was formerly the Florida Railroad and Public Utilities Commission.

[4]The statute defines "public utility" as including natural gas distributors, but not LP gas distributors. Fla.Stat.Ann. § 366.02.

rates, the FPSC is authorized to consider "the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public; [and] the ability of the utility to improve such service and facilities. . . ." *Id.* at § 366.041. The FPSC may also "require repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public. . . ." *Id.* at § 366.05.

After 1974, the Florida statute expressly provided the FPSC with the power to authorize territorial agreements between electric utilities. Section 366.04(2) provided: "In the exercise of its jurisdiction, the [FPSC] shall have power over rural electric cooperatives and municipal electric utilities for the following purposes: . . . (d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction." *Id.* at § 366.04(2) (West Supp.1989). The statute said nothing about territorial agreements among natural gas utilities such as City Gas and Peoples.[5] In 1965, however, the Florida Supreme Court held that the FPSC had implied authority under chapter 366 to approve or forbid the territorial agreement between Peoples and City Gas. *City Gas Co. v. Peoples Gas System, Inc,* 182 So.2d 429, 436 (Fla.1965).[6]

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[5]Section 366.04 was revised in 1989 and the new statute expressly empowers the FPSC to approve territorial agreements between natural gas utilities. *See* 1989 Fla.Sess.Law Serv. 89-292 § 2 (West).

[6]In *City Gas Co.*, Peoples had sued under the territorial agreement to prevent City Gas from selling bottled gas in Peoples service area. City Gas's answer claimed that the territorial agreement was void under state and federal antitrust laws. *City Gas Co.*, 182 So.2d at 431. The Florida Supreme Court held that because the FPSC had the authority to approve the territorial agreement the agreement was not invalid under Florida antitrust laws. The court did not reach the federal issues. *Id.* at 436.

B. *Procedural History*

1. District Court

On April 23, 1983, Consolidated filed its complaint in the present action. The amended complaint alleged that City Gas's actions constituted an attempt to monopolize and monopolization in violation of section 2. Consolidated asked for treble damages under 15 U.S.C.A. § 15 and injunctive relief under 15 U.S.C.A. § 26. City Gas counterclaimed that Consolidated's restrictive covenants and easements in Bel Aire precluded City Gas from competing for Consolidated's customers in violation of 15 U.S.C.A. §§ 1, 2, and 14.

The district court held a nine-day bench trial in October 1985. The court determined that the territorial agreement violated section 2 and rejected City Gas's defense that because the FPSC approved the agreement the territorial agreement was exempt from antitrust liability under the state action doctrine of *Parker v. Brown,* 317 U.S. 341, 351, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943). *Consolidated Gas Co. v. City Gas Co.,* 665 F.Supp. 1493 (S.D.Fla. 1987).

2. Panel Opinion

On appeal, City Gas argued that it was immune from antitrust liability for the territorial agreement and the refusal to deal with Consolidated under the state action doctrine. The panel unanimously rejected these arguments and affirmed the district court. The panel held that because chapter 366 explicitly authorized territorial agreements between electric utilities without mentioning gas utilities, the statute did not clearly articulate a state policy favoring territorial agreements among gas utilities and, therefore, state action immunity could not apply. *Consolidated Gas Co. v. City Gas Co.,* 880 F.2d 297, 301–02 (11th Cir. 1989). The panel rejected City Gas's argument that the Florida Supreme Court decision in *City Gas Co.,* holding that chapter 366 impliedly authorized territorial agreements

among gas companies, was sufficient to invoke the state action doctrine. *Id.* at 303.

II. ANALYSIS

A person (or corporation) violates section 2 when he (1) possesses monopoly power in the relevant market and (2) willfully acquires or maintains that power through means other than growth or development as a consequence of superior products, business acumen, or historical accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71, 86 S.Ct. 1698, 1703–04, 16 L.Ed.2d 778 (1966). In *Parker*, however, the Supreme Court recognized that in passing the Sherman Act Congress did not intend to restrain state action or official action directed by a state to restrain competition. *Parker*, 317 U.S. at 351, 63 S.Ct. at 313.

In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the Supreme Court found that the *Parker* doctrine applied to private parties who restrain competition in violation of the Sherman Act if (1) the challenged restraint was implemented pursuant to a clearly articulated and affirmatively expressed state policy, and (2) the policy was actively supervised by the state. *Id.* at 105, 100 S.Ct. at 943. In *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985), the Supreme Court reaffirmed the applicability of the *Midcal* two-pronged test to private parties' claims of state action immunity and held that a state policy that permits but does not compel anticompetitive conduct may be clearly articulated for purposes of the first prong of *Midcal*. *Id.*, 471 U.S. at 61, 105 S.Ct. at 1729.

City Gas argues that the territorial agreement is immune from antitrust liability under *Midcal* and *Southern Motor Carriers*. Consolidated argues that the territorial agreement is not entitled to immunity because chapter 366 does not constitute a clearly articulated state policy

authorizing such agreements and the state does not actively supervise such a policy.

1. Clearly Articulated State Policy

In *Southern Motor Carriers,* the United States sued two rate bureaus—groups of private carriers that jointly set rates—for violations of the antitrust laws. *Southern Motor Carriers,* 471 U.S. at 50, 105 S.Ct. at 1723. The rate bureaus submitted their rate proposals to the public service commissions in each state for approval or rejection. *Id.* Of the four states involved, three had statutes explicitly permitting collective ratemaking. *Id.* at 63, 105 S.Ct. at 1730. The Court held that these statutes satisfied the first prong of *Midcal. Id.* The fourth state, Mississippi, had no statute addressing collective ratemaking. Mississippi statutes did, however, authorize the State Public Service Commission to regulate common carriers and to prescribe just and reasonable rates. *Id.* (citing Miss.Code Ann. §§ 77–7–1, 221). The Court held that this statute made clear the legislature's intent that rates should be determined by a regulatory agency rather than by the market. *Id.* at 63–64, 105 S.Ct. at 1730. This intent, the Court held, was sufficient to pass the first prong of *Midcal. Id.* at 64–65, 105 S.Ct. at 1730–31.

> A private party acting pursuant to an anticompetitive regulatory program need not "point to specific, detailed legislative authorization" for its challenged conduct. As long as the state as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied.

Id. at 64, 105 S.Ct. at 1730. The Court noted that requiring express statutory authorization of every action that an agency might take to implement a policy would diminish the flexibility of agencies and consequently their usefulness to state governments. *Id.*

In the present case, chapter 366 grants the FPSC broad powers to regulate public utilities, including natural gas

distributors. Section 366.05 authorizes the FPSC to regulate repairs and extensions of facilities. *See Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 42, 105 S.Ct. 1713, 1718, 85 L.Ed.2d 24 (1985) (statute authorizing city to provide sewage services and to determine the areas to be served would logically result in anticompetitive conduct, and, therefore, the legislature must have intended such conduct). The Florida Supreme Court has interpreted chapter 366 to empower the FPSC to authorize territorial agreements between natural gas distributors. *City Gas Co.,* 182 So.2d at 436. This statute, as interpreted by the Florida courts, demonstrates the Florida legislature's intent to displace competition with a regulatory scheme. Chapter 366, therefore, satisfies the first prong of *Midcal.*

The Court holds today that the Florida Supreme Court opinion in *City Gas Co.* is irrelevant under the first prong of *Midcal* because the applicability of federal antitrust law is an issue of federal law. The Court is correct in part; the issue of whether *Midcal* is satisfied is one of federal law. The content, however, of the state law to which the federal courts apply the *Midcal* test is determined under state law. *See Cotton States Mut. Ins. Co. v. Anderson,* 749 F.2d 663, 667 (11th Cir.1984). Accordingly, this Court must apply the *Midcal* test to the Florida statute as interpreted by the Florida courts. *See City of Eau Claire,* 471 U.S. at 44–45 n. 8, 105 S.Ct. at 1719 n. 8 ("Although the Wisconsin Supreme Court's opinion does not, of course, decide the question presented here of the city's immunity under the *federal* antitrust laws, it is instructive on the question of the state legislature's intent in enacting the statutes. . . ." (emphasis in original)). The Court concludes that the Florida Supreme Court should not have the last word on the proper interpretation of chapter 366 and endorses the district court's critique of the Florida Supreme Court's analysis of the Florida statute. *Consolidated Gas,* 880 F.2d at 303 (recounting district court's analysis of chapter 366's language). Because the Florida Supreme Court is the final

authority on the meaning of chapter 366, we should not endorse such a critique. *Cotton States,* 749 F.2d at 667 (" '[s]tate courts have a right to construe their own statutes,' and federal courts are bound by that state interpretation." (citation omitted)).

2. Active Supervision

The Court also holds that the agreement was not actively supervised by the state. The active supervision prong of *Midcal* stems from the Supreme Court's recognition that where private parties engage in anticompetitive conduct they are likely to act in their own interests rather than in the interests of the state. *Patrick v. Burget,* 486 U.S. 94, 100, 108 S.Ct. 1658, 1662, 100 L.Ed.2d 83 (1988). The active supervision prong ensures that the state action doctrine will immunize only the particular activities of private parties that, in the judgment of the state, further state regulatory policies. *Id.* In *Patrick,* the Supreme Court stated that in order to satisfy the active supervision requirement, the state must exercise "ultimate control over challenged anticompetitive conduct." *Id.* at 101, 108 S.Ct. at 1663.

> The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Id.

In *Patrick,* the plaintiff challenged the peer-review process in a hospital after a peer-review panel threatened to revoke his hospital privileges. *Id.* at 97, 108 S.Ct. at 1661. The Supreme Court held that the peer-review process was not entitled to state action immunity because there was no

active supervision by the state. *Id.* at 100, 108 S.Ct. at 1662. The Court rejected the defendants' arguments that the state actively supervised the peer-review process through the State Health Division, the State Board of Medical Examiners, and the state judiciary because the defendants failed to show that any of these state entities actually reviewed, or even could review, peer-review decisions regarding hospital privileges. *Id.* at 101, 108 S.Ct. at 1663.[7]

In the present case, I would hold that the state actively supervised the territorial agreement. The FPSC actually reviewed the territorial agreement and approved it. First, the FPSC found that it had the authority to accept or reject the territorial agreement. The *Order* stated that because the territorial agreement purported to impinge on the FPSC's authority to order additions and extensions to plant and equipment of Peoples and City Gas, the territorial agreement could not be valid without the FPSC's approval. *Order* at 1. Second, the *Order* approved the territorial agreement; the FPSC found that the territorial agreement was consistent with the state's policy of procuring for the public essential utility services at reasonable costs. *Id.* Accordingly, FPSC's *Order* satisfies the active supervision requirement of *Midcal*.[8]

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[7]The Court found that the judiciary was an inadequate supervisor because no statute expressly provided for judicial review of privilege terminations, and because state courts did not review privilege terminations on the merits for compliance with state policy. *Patrick*, 486 U.S. at 104–05, 108 S.Ct. at 1664–65.

[8]The FPSC has reviewed the validity of the territorial agreement on two subsequent occasions. First, in 1965, the FPSC entered an order withdrawing part of its approval of the territorial agreement. *Peoples Gas Systems, Inc. v. Mason*, 187 So.2d 335, 337 (Fla.1966). The Florida Supreme Court overturned the FPSC's decision because there was no showing of changed circumstances from 1960, when the FPSC promulgated the *Order*. *Id.* at 339 (FPSC may withdraw or modify its approval only after proper notice and hearing, and upon a showing of

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III. CONCLUSION

Because the Florida regulatory scheme satisfied both prongs of *Midcal*, I believe that the district court erred in holding that the territorial agreement is not entitled to state action immunity.

TJOFLAT, Chief Judge, dissenting:

I. INTRODUCTION

At first blush, this case appears to involve a straightforward application of section 2 of the Sherman Act, 15 U.S.C. § 2 (1988). A natural gas utility, City Gas Company (City Gas), with an apparent monopoly in the natural gas business in south Florida, refused to sell wholesale natural gas to another company, Consolidated Gas Company (Consolidated), that wanted to enter the natural gas business too. Consolidated brought suit under sections 4 and 16 of the Clayton Act, 15 U.S.C. § § 15(a), 26 (1988),[1] claiming that City Gas refused to deal in violation of section 2 and thus requesting an injunction ordering City Gas to supply wholesale natural gas to Consolidated and damages. The

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changed circumstances). Second, in 1972 the FPSC rescinded and then reaffirmed its approval of the territorial agreement. FPSC Order Nos. 5495, 5800. Accordingly, the FPSC's active supervision is continuing.

[1]These sections of The Clayton Act authorize private actions under the antitrust laws. Section 4 authorizes private actions for treble damages and provides in pertinent part: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . ." 15 U.S.C. § 15(a). Section 16 authorizes private actions for injunctive relief, and provides in pertinent part: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws. . . ." *Id.* § 26.

district court held in favor of Consolidated and granted the requested relief.

On closer inspection, however, the case's stripes begin to change. Because of certain factual peculiarities of this case—peculiarities that the district court deemphasized—established theories of liability under section 2 simply do not apply. To begin with, City Gas operates only at the retail distribution level of the natural gas business; the company does not, and never has, operated at the wholesale level of that business. That is, City Gas obtains a supply of gas from the region's only wholesale supplier, Florida Gas Transmission Company (FGT), and then distributes that gas to commercial and residential customers. City Gas has chosen to operate only on that level, and its natural gas rates—which are set by the Florida Public Service Commission (FPSC) based on a detailed analysis of City Gas' operation, *see* 1989 Fla.Stat. ch. 366, *supra* 5220–5221, ____ - ____—reflect the specifics of its operation *on the retail level.* For City Gas to enter the wholesale supply business as well as the retail distribution business would fundamentally change the nature of its operation and thus the structure of its rate base. Consolidated, however, wanted City Gas to alter the nature of its operation and enter the wholesale natural gas business. Consolidated, moreover, wanted City Gas to make this change so that Consolidated could itself enter the retail distribution business and compete with City Gas. And Consolidated thought that City Gas should do this, not because competition would necessarily benefit natural gas consumers in general, but because City Gas provided the most economical source of wholesale gas *for Consolidated.* According to Consolidated, under these circumstances, section 2 of the Sherman Act required City Gas to do what Consolidated wanted.

Unbelievably enough, Consolidated persuaded the district court that City Gas should be required fundamentally to change the nature of its operation and sell

wholesale natural gas to Consolidated so that Consolidated could compete against City Gas in the retail distribution business. Consolidated also persuaded the district court that established theories of liability under section 2 mandated this result. What is even more unbelievable, Consolidated has also persuaded this court, sitting en banc, on these same points. This court, therefore, affirms the district court's decision.[2]

With all due respect, I strongly dissent. In my view, the district court's decision is unsupported by established antitrust law. Because the district court did not take proper account of the fact that City Gas *was not* in the business of selling natural gas at wholesale, the district court improperly concluded that City Gas possessed monopoly power in the relevant market for purposes of section 2. Based on that erroneous conclusion, the district court also improperly applied to these facts the primary theories of liability under section 2—namely, the "essential facilities doctrine" and the "intent test." The district court's decision, therefore, has no basis in established antitrust law.

Instead, the district court in effect created a new rule of liability under section 2. Neither the district court, nor this court today, however, has considered the practical implications of this rule. Having failed to do so, the district court could not have properly applied this new rule in the present case. Even if today's court upholds this new rule, therefore, I would reverse the district court's decision and remand for further proceedings as required by the rule. In my view, though, a thorough consideration of the new rule's practical implications leads unavoidably to the conclusion that this new rule should be struck down. In attempting to apply the rule, the district courts of this circuit will face insurmountable difficulties in fashioning and implementing

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[2]The panel, and this court today, have adopted the district courts findings of facts and conclusions of law. For the sake of convenience, therefore, I refer throughout this dissent to the district court's decision.

effective remedies. Even if the courts can overcome these difficulties, which I doubt, the rule will lead to results that will be flatly inconsistent with the policies behind the antitrust laws.

In addition to these fundamental points, I also dissent from the district court's conclusion that the state-action immunity doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), did not protect City Gas' conduct from antitrust liability. I dissent as well from the district court's conclusion that a 1960 territorial agreement between City Gas and Peoples Gas, Inc. (Peoples Gas), another retail distributor of natural gas in Florida, provided an alternate basis for liability under section 2.

This dissent is organized as follows: in part II, I restate the factual background of the case. In part III, I demonstrate that City Gas' territorial agreement with Peoples Gas provides no basis for liability. I then turn to the more fundamental problems with the district court's decision.

In part IV, I criticize the district court's conclusion that City Gas possessed monopoly power in the relevant market. In part V, I discuss the formulas for determining liability on which the district court relied: the essential facilities doctrine and the intent test. As I demonstrate, none of these formulas provides a basis for liability here. I then discuss some recent Supreme Court and lower court decisions also relied on by the district court. None of these decisions control the present case either.

Next, having established that the district court's decision has no basis in established antitrust law, I assume that the district court established a new rule of antitrust law and, in part VI, consider the practical implications of that rule. As this part shows, the rule will be impossible to apply, and even if it can be applied, it will produce results that are inconsistent with the policies behind the antitrust laws. For those reasons, I conclude that Congress could not have

intended such a rule to be developed under section 2. Because the court today nevertheless upholds this rule, I also demonstrate that the district court failed to apply it properly in the present case. On that basis, I would vacate the district court's decision and would remand the case for further proceedings as I describe.

In part VII, I then take up the issue of state-action immunity, demonstrating that in this case, the doctrine protects City Gas from antitrust liability. Finally, I conclude the dissent in part VIII.

II. BACKGROUND

This case involves two retail distributors of natural gas in Florida. Consolidated, the plaintiff in this case, entered the gas distribution business in the early 1960s and decided to distribute LP gas. Consolidated received its LP gas by rail or truck from wholesale suppliers and stored it in its own tanks. Consolidated then transported the LP gas from its storage tanks to its customers through a series of underground pipes located in easements. City Gas, the defendant in this case, entered the retail gas business in 1949, also as an LP gas company. In the early 1960s, however, when natural gas became available for resale in Florida, City Gas began to supply natural gas as well. Natural gas differs from LP gas in that it is transportable only by pipeline. In addition, unlike the unregulated interstate trade of LP gas, the Federal Energy Regulatory Commission (FERC) regulates the transportation of wholesale natural gas through interstate pipelines. FGT owns the interstate pipeline supplying wholesale gas in Florida. In order to acquire a supply of natural gas for resale from FGT, therefore, City Gas had to obtain FERC authorization, which it did. City Gas also had to build a

lateral pipe to connect the pipesystem that it used to transport LP gas to FGT's pipeline.[3]

In September 1960, City Gas also enred into a territorial agreement with Peoples Gas, another natural gas retail supplier in Florida. Pursuant to this agreement, the two companies determined which territories each would serve and agreed not to compete with one another in those territories. The companies requested, and received, approval of this agreement by the FPSC, which was charged by statute to supervise and regulate public utilities, *see* Fla.Stat. ch. 366 (1987).[4] In subsequent litigation between the two companies, the Florida Supreme Court upheld the agreement as consistent with state antitrust laws and also held that the FPSC had authority under chapter 366 of the Florida Statutes, *see id.*, to approve such agreements. *See City Gas Co. v. Peoples Gas Sys., Inc*, 182 So.2d 429, 435–36 (Fla.1965).

When City Gas entered the natural gas business, the price of natural gas was higher than that of LP gas, but both were relatively low. That remained the case until 1973, when the Arab Oil Embargo (an event beyond City Gas' control) skyrocketed world oil prices, including the price of LP gas. Until the early 1980s, however, natural gas suppliers were not in much better shape. Although federal regulation of wholesale rates kept the price of natural gas relatively low, a national shortage of natural gas severely limited its availability for resale. By 1981, things began to change: a

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[3]The district court made much of the fact that FGT assumed the lateral pipe costs. Given the uncertain state of the natural gas market in the 1960s, however, *see infra* slip op. at 5137, ____, that fact is of little significance. Because the natural gas market was limited and its future uncertain, City Gas still took a large degree of initiative and assumed substantial risk in devoting its resources to natural gas distribution.

[4]The statute has been amended. *See* 1989 Fla. Laws ch. 89–292 (codified as amended, Fla.Stat. ch. 366 (1989)). See *infra* note 86, for a discussion of the amendment and its relevance to the present case.

natural gas surplus developed. As a result, LP distributors such as Consolidated found themselves unable to compete with natural gas prices; they were forced to convert to natural gas, a process that Consolidated began in early March 1982. On the other hand, those companies such as City Gas, which had risked entering the natural gas business at a time when the future of natural gas was relatively uncertain, found themselves in a position to enjoy the benefits of their initiative. A combination of historical accident (the rise in oil prices as the result of events in the Arab world) and business initiative (investing in the natural gas trade) resulted in economic benefits for companies such as City Gas.

In February 1982, one month before Consolidated undertook its conversion, City Gas began to market its natural gas to Consolidated's LP gas customers. These marketing efforts included door-to-door solicitations, mailing campaigns, and newspaper advertisements. As a result of these efforts, City Gas signed several customers that Consolidated had previously served.[5] In order to serve

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[5]The district court put an unwarranted spin on its characterization of these facts. Adopting a good-guys/bad-guys motif, the district court cast Consolidated as the good guys and City Gas as the bad guys. Everything that City Gas did was bad—part of large-scale and well-planned effort to drive out all competition from the natural gas industry and thereby grease the wheels of its large, rumbling monopoly. As the good guys, Consolidated naturally suffered, finding itself the weak and unwitting victim of the monstrous monopolist.

In my view, this characterization was unjustified. Viewed objectively, City Gas' conduct was that of a rational business actor. It adopted an aggressive marketing campaign to increase its customer base—activity that epitomizes competition but that the district court labeled anticompetitive because the conduct was a competitive success. Consider the district court's characterization of City Gas' marketing efforts. The district court noted that, shortly before undertaking this marketing and expansion effort, City Gas' Board of Directors met and considered acquiring Consolidated—which was then simply a struggling LP gas

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company—a consideration that hardly constitutes anticompetitive conduct. The district court then stated:

> City Gas' solicitations and pipeline extensions were not simply ordinary business expansions, but rather, were basic components of City Gas' strategy to force Consolidated to sell out. This conclusion is further supported, we think, by the fact that City Gas had to duplicate a portion of Consolidated's pipeline in order to serve the eighteen Consolidated customers it had recently signed. Yet if City Gas had expected to reach a purchase agreement with Consolidated, it would have acquired Consolidated's pipelines and would not have had to incur this expense. City Gas' action of duplicating these pipelines before notifying Consolidated of its interest in acquiring the company seems to have been designed to force Consolidated to sell at a low price or face the resultant certainty of losing its customers and their value as quickly as City Gas could serve them.

This characterization of these events is, in my view, absurd. As the Supreme Court stated in *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966), what violates section 2 of the Sherman Act is "the willful acquisition or maintenance of [monopoly] power *as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.*" (Emphasis added.) City Gas' successful expansion effort was clearly the latter: the very type of growth or development that defines competition. If the courts were to characterize as anticompetitive conduct every effort that businesses undertook to expand their business through advertising and building facilities, we would soon find ourselves in a competitive crisis. And surely the district court did not mean to argue that because City Gas legitimately intended to compete for Consolidated's business—which would in turn reduce the value of Consolidated's assets—City Gas' conduct suddenly became anticompetitive. I can think of no legitimately competitive conduct that, when successful, does not adversely affect a less-successful competitor's assets: when one cola company captures a higher percentage of the market, another cola company's market share slips.

Nor was the district court justified in characterizing Consolidated as a victim because, in attempting to enter the natural gas market as a retail distributor, it had to face City Gas as a competitor. Consider these passages from the district court's opinion:

> In deciding to convert from LP gas to natural gas in 1982, Consolidated suddenly found itself in potential competition with City Gas, which had grown to be a giant in the south Florida area.

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these customers, City Gas expanded its pipeline into Consolidated's service area.[6]

Consolidated undertook to convert to natural gas. On March 9, 1982, Consolidated "wrote a letter to FGT requesting that FGT begin providing it with natural gas, and that FGT construct the necessary pipeline facilities." *Consolidated Gas Co. v. City Gas Co.*, 665 F.Supp. 1493, 1504 (S.D. Fla.1987). As the district court found, FGT responded on April 2, 1982, stating that Consolidated would need a natural gas allocation from FERC in order to purchase wholesale gas from FGT and that Consolidated

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. . . Consequently, Consolidated was forced to compete with City Gas in order to retain its customers or else see them go to City Gas for *more economical* gas service.

. . . .

. . . Thus, it became crucial that Consolidated convert to natural gas for as low a cost as possible in order to be able to offer rates that were competitive with those City Gas could offer.

665 F.Supp. at 1505–06 (emphasis added). City Gas had the foresight and took the initiative to enter the natural gas business at an early stage. By 1982, as the result of "growth [and] development as a consequence of a superior product, business acumen, [and] historic accident," *Grinnell*, 384 U.S. at 570–71, 86 S.Ct. at 1704, City Gas found itself in a highly competitive position. For that, City Gas need not feel guilty. And for having failed to jump that train itself, Consolidated can claim no sympathy.

By holding that under these circumstances Consolidated can invoke the antitrust laws to require City Gas to underwrite Consolidated's entry into the natural gas market, the district court, affirmed by the court today, embarked on an entirely unprecedented course. Before embarking, however, we should be entirely clear that under established law, City Gas *has done nothing wrong.*

[6]This expansion effort triggered a lawsuit by Consolidated, seeking an injunction to prevent City Gas from laying pipe in certain utility easements over which Consolidated claimed an exclusive right. The State Circuit Court granted Consolidated a preliminary injunction but then dissolved it, and the State Court of Appeal affirmed the dissolution, holding that Consolidated had no exclusive right to the easement.

would have to reimburse FGT approximately $250,000.00 for the cost of connecting to FGT's pipeline. FGT suggested that Consolidated instead arrange to connect to City Gas' pipesystem. On May 21, 1982, Consolidated applied to FERC for the allocation approving its connection to FGT's pipeline. On June 21,1982, City Gas filed a petition to intervene in the application proceedings in order to oppose Consolidated's requested allocation. City Gas questioned whether Consolidated's LP gas distribution system could operate at the pressures required for natural gas delivery and also whether FGT's natural gas supply was adequate to serve Consolidated as well as City Gas. On November 21, 1983, an administrative law judge granted Consolidated's application, and FERC affirmed on September 19, 1984. FERC ruled, however, that FGT had to pay the connection costs. The entire administrative process lasted approximately twenty-eight months.

The district court found that City Gas' intervention in the FERC proceedings delayed the approval process for approximately one year. According to the district court, if City Gas had not intervened, the entire process would have taken only six to nine months, and Consolidated would have received a temporary allocation within ninety days of filing its application. The district court further found that, as a result of City Gas' intervention and the resulting delay in the proceedings, Consolidated's business was "severely hurt": "During the course of the proceedings, City Gas began providing service to seven of Consolidated's eight commercial customers and the bulk of its residential customers." *Id.* at 1510. Presumably, City Gas' provision of service to Consolidated's customers resulted from City Gas' marketing efforts and the fact that (because of historical accident and its own business initiative) it was equipped to expand and supply natural gas to those customers. The district court, however, concluded these activities "were not simply ordinary business expansions, but rather, were basic components of City Gas' strategy to force Consolidated to

sell out." *Id.* at 1507.[7] Based on these facts, the district court found that "Consolidated was left with only [one] alternative if it was to remain in business: the purchase of natural gas directly from City Gas."[8] *Id.* at 1510.

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[7]The district court again applied its good-guys/bad-guys characterization to City Gas' intervention into the FERC proceedings. Although the district court held that City Gas' intervention did not itself constitute a violation of section 2, the court suggested that the action was evidence of City Gas' bad motives. This was so for two reasons: "first, Consolidated was severely damaged by the delay which occurred as a direct result of City Gas' intervention; and, second, City Gas' reason for opposing Consolidated's application was to protect its own domain." 665 F.Supp. at 1542. Neither the district court, nor any one else, ever indicated that City Gas had committed an abuse of process by intervening into the FERC proceeding. On the contrary, City Gas, along with some other intervening natural gas suppliers, had legitimate concerns relating to Consolidated's requested allocation. In my view, a rational business actor has a strong interest in "protect[ing] its own domain." *Id.* Thus, City Gas did nothing wrong in intervening in the proceedings. If Consolidated's request for an allocation took longer than Consolidated expected, that may have harmed Consolidated but the fault is certainly not attributable to City Gas, which merely exercised its right to petition in a legitimate way. Perhaps the problem was that Consolidated's expectations, which the district court seems to have adopted, were entirely unreasonable.

[8]As the district court noted, shortly before undertaking this marketing and expansion effort, City Gas' Board of Directors had met and passed a resolution to acquire "the assets of Consolidated Gas Company and take whatever steps with respect thereto, as they deem appropriate." 665 F.Supp. at 1507. Based on these facts, the district court concluded

> that City Gas' solicitations and pipeline extensions were not simply ordinary business expansions, but rather, were basic components of City Gas' strategy to force Consolidated to sell out. This conclusion is further supported, we think, by the fact that City Gas had to duplicate a portion of Consolidated's pipeline in order to serve the eighteen Consolidated customers it had recently signed. Yet if City Gas had expected to reach a purchase agreement with Consolidated, it would have acquired Consolidated's pipelines and would not have had to incur this expense. City Gas' action of duplicating these pipelines before notifying Consolidated of its interest in acquiring the company seems to have been designed to force Consolidated to sell at

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City Gas and Consolidated had already entered into negotiations regarding the possibility of such purchases. They could not, however, arrive at an acceptable price for the transaction. City Gas initially offered to sell gas for resale at cost plus ten cents per therm [9] and later at cost plus five cents per therm. Consolidated rejected the offers as unreasonable and brought suit under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a), 26, claiming that City Gas' conduct constituted a refusal to deal in violation of section 2 of the Sherman Act. The district court agreed with Consolidated and held that City Gas' offered prices were unreasonably high, thus constituting a refusal to deal in violation of section 2.

The district court also found, however, that City Gas had never before sold gas at wholesale. Although it had entered into a contract in 1965 to sell wholesale gas to another retail distributor, Florida Gas, that contract was abandoned by the parties and City Gas never performed under it. Aside from that isolated (and unperformed) contract, City Gas operated entirely at the retail level.

Consolidated claimed that City Gas violated section 2 of the Sherman Act both by offering to sell gas to Consolidated

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a low price or face the resultant certainty of losing its customers and their value as quickly as City Gas could serve them.

Id. at 1507–08.

Faced with this situation, Consolidated began its effort to convert to natural gas. As the district court stated: "In deciding to convert from LP gas to natural gas in 1982, Consolidated suddenly found itself in potential competition with City Gas, which had grown to be a giant in the south Florida area." *Id.* at 1505.

[9] "Therm," as defined in the FPSC's regulations under chapter 366, "denote[s] a unit of heating value equivalent to one hundred thousand (100,000) British thermal units." 1986 Fla.Admin. Code Ann. 25–7.003(15). A British thermal unit is, of course, "the quantity of heat required to raise the temperature of one pound of water one degree Fahrenheit." *Id.* at 25–7.003(14).

at unreasonably high prices, which constituted a refusal to deal under section 2, and by entering into a territorial agreement with Peoples Gas. In part III, I consider the territorial agreement and show that it provides no basis for liability in the present case. In parts IV through VI, I then turn to the purported refusal to deal, demonstrating that it provides no basis for liability either. Finally in part VII, I show that even if City Gas' conduct justifies the imposition of liability under section 2, City Gas is immune under the state-action immunity doctrine of *Parker*, 317 U.S. at 341, 63 S.Ct. at 307.

III. THE TERRITORIAL AGREEMENT

The court today adopts the district court's holding that City Gas' territorial agreement with Peoples Gas constituted a violation of section 2. I disagree with that holding and would reverse on that basis.

Section 2 of the Sherman Act provides in pertinent part: "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ." 15 U.S.C. § 2 (1988). As the Supreme Court stated in *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966):

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

The district court analyzed the territorial agreement under this standard and held that it constituted a "willful acquisition" of monopoly power under the second prong. As

I discuss below, the district court should never have reached this issue in the first place because City Gas did not possess monopoly power in the relevant market. *See infra* slip op. at 5152–5162, ____ - ____. Putting the monopoly power issue aside for the moment, however, the district court erred in holding City Gas liable under section 2 based on the territorial agreement.

Section 2 itself provides no cause of action for a private plaintiff. Private plaintiffs bring such actions under section 4 of the Clayton Act, 15 U.S.C. § 15, which provides an action for treble damages for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[10] Before a private plaintiff can challenge a monopolist's conduct under section 2 of the Sherman Act, therefore, it must satisfy the requirements of section 4 of the Clayton Act.[11]

Although section 4 is broadly worded, courts have interpreted the section's "injured . . . by reason of" language as imposing a causation requirement on the private plaintiff. As this court has stated, the plaintiff must show "a

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[10]Section 16 of the Clayton Act also provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26. As I discuss below, *see infra* slip op. at 5148–5152, ____-____, courts have interpreted section 16 as imposing a causation requirement that is similar to section 4's. For purposes of convenience, I refer only to the requirement under section 4, but the discussion also applies to Consolidated's request for injunctive relief under section 16 to the extent that its request is based on the territorial agreement.

[11]The Government brings civil enforcement actions under section 4 of the Sherman Act, 15 U.S.C. § 4, which provides, in pertinent part:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of the title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . .

causal relationship between the antitrust violation [alleged] and the injury [sustained]." *Cable Holdings, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1561 (11th Cir.1987) (quoting *National Indep. Theater Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602, 607 (11th Cir.1984), *cert. denied*, 471 U.S. 1056, 105 S.Ct. 2120, 85 L.Ed.2d 484 (1985)). To satisfy this "causal relationship" requirement, the plaintiff must show that the violation is "a material cause of," *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571 n. 9, 23 L.Ed.2d 129 (1969), or "materially contributed to," *Cable Holdings*, 825 F.2d at 1562, its injury. Beyond this obvious requirement, the plaintiff must also prove "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) (emphasis original); *see Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 539–40, 103 S.Ct. 897, 909, 74 L.Ed.2d 723 (1983) (refining *Brunswick* test); *Blue Shield v. McCready*, 457 U.S. 465, 476–78, 102 S.Ct. 2540, 2546–48, 73 L.Ed.2d 149 (1982) (same); *see also Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 113–15, 107 S.Ct. 484, 491, 93 L.Ed.2d 427 (1986) (antitrust injury requirement also applies in suits for injunctive relief under section 16 of Clayton Act).[12]

Although the antitrust injury analysis is somewhat complex, I do not belabor it here. In my view, Consolidated has not satisfied even the basic element of the causation requirement with respect to the territorial agreement: that

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[12]In the *Brunswick* case, for example, the plaintiff had already proved that its loss "occurred 'by reason of' the unlawful [conduct]," or as a material result of that conduct, but the Court held that the plaintiff had not proved that the loss occurred "'by reason of' that which made the [conduct] unlawful." *Brunswick*, 429 U.S. at 488, 97 S.Ct. at 697. In short, not every injury materially caused by conduct proscribed by the antitrust laws will justify a recovery under those laws.

agreement is simply not a material cause of Consolidated's injury. Without giving any apparent thought to this causation requirement, the district court summarily concluded that the territorial agreement constituted a "willful acquisition . . . of monopoly power" under the second prong of the *Grinnell* standard and, on that basis, imposed liability on City Gas under section 2. Whether or not the agreement constituted a "willful acquisition" under the *Grinnell* standard,[13] the agreement also had to satisfy the causal connection requirement of section 4. As I demonstrate now, it did not do so.

Consolidated's injury, as stated in its amended complaint, was the economic loss that followed from its inability to enter the natural gas market as a retail gas distributor. Consolidated, of course, traced that injury to conduct by City Gas. The district court considered two specific forms of conduct by City Gas: (1) its refusal to supply wholesale gas to Consolidated; and (2) its territorial agreement with Peoples Gas. Putting aside the issue of liability under section 2,[14] the refusal to deal would be a material cause of Consolidated's injury: Consolidated could not enter the retail gas market without a supply of gas; City Gas refused to provide such a supply; Consolidated, therefore, could not enter the market and suffered economic loss as a result.

No such causal connection exists, however, between Consolidated's injury and the territorial agreement. That

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[13]As I discuss below, the district court was also off target in attempting to fit this case into the "willful acquisition" prong of the *Grinnell* standard. *See infra* part V.

[14]Consolidated raised only a section 2 claim, charging in its amended complaint that City Gas' conduct constituted an attempt to monopolize and monopolization under *section* 2 of the Sherman Act. Consolidated has not presented a claim under section 1 of the Sherman Act, 15 U.S.C. § 1, attacking City Gas' conduct as part of a conspiracy in restraint of trade. The territorial agreement might have been relevant to such a claim.

agreement relates to competition between City Gas and Peoples Gas, two retail distributors of natural gas. Pursuant to the agreement, each company took control of a given distribution area and agreed not to compete for control of the other company's distribution area.[15] The direct causal result of the agreement, therefore, was that City Gas could operate in its distribution area without competition from Peoples Gas. Given that no other competitor seriously challenged City Gas' control of that distribution area, the agreement may have ensured City Gas' acquisition of monopoly power in that distribution area. Even without the agreement, however, a single company would eventually have gained control over what became City Gas' territory. After an initial period of competition, a single natural gas distributor almost inevitably acquires a natural monopoly in a given distribution area. Although the territorial agreement might have affected this process in the present case, I doubt that its absence would have changed the present situation. City Gas, as the company already operating in its current area, would probably have acquired the natural monopoly over service in that area, and if City Gas had not, another company would have done so. With or without the territorial agreement, Consolidated would still have been in the same position: trying to enter the retail distribution market in an area under the control of a monopolist.

Even if the territorial agreement was a material cause of City Gas' acquisition of monopoly power, it still would not

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[15]Consolidated claimed that this agreement was a horizontal market division. As the Court explained in *United States v. Topco Assocs.*, 405 U.S. 596, 608, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972), a horizontal market division is

> an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a "horizontal" restraint, in contradistinction to combinations of persons at different levels of the market structure, *e.g.*, manufacturers and distributors, which are termed "vertical" restraints.

have been a material cause of Consolidated's injury: City Gas' possession of monopoly power did not cause Consolidated's injury. Rather, that injury was caused by how City Gas chose to *exercise* its monopoly power. Of course, the fact that City Gas had monopoly power was an important condition underlying the whole case. That power led Consolidated to request a supply of wholesale gas from City Gas in the first place and gave City Gas the choice whether or not to sell the gas in the second place. That power, standing alone, however, did not injure Consolidated. City Gas could just as easily have used its monopoly power to help Consolidated as to hurt Consolidated. City Gas' decision about how to exercise its monopoly power, therefore, determined whether or not Consolidated was injured.[16] Thus, the territorial agreement, even if it was a material cause of City Gas' acquisition of monopoly power, was not a material cause behind City Gas' decision on how to exercise that power or behind that decision's result—i.e., Consolidated's injury.

The district court's improper treatment of the territorial agreement in this case resulted, in my view, from a failure to grasp the distinction between a private antitrust suit under section 4 of the Clayton Act, which challenges conduct as violative of section 2 of the Sherman Act, and a government enforcement action brought directly under the Sherman Act, *see supra* notes 1, 10–11. The *Grinnell* case, for example, involved a government action. The district court, however, cited *Grinnell* (and only *Grinnell*) for the

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[16]In this respect, section 4's causation requirement parallels the elements of liability under section 2. As courts have stated, monopoly power alone provides no basis for liability under section 2; rather, the improper exercise of that power justifies the imposition of liability. *See, eg., Byars v. Bluff City News Co.*, 609 F.2d 843, 853 (6th Cir.1979); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979) (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 62, 31 S.Ct. 502, 516, 55 L.Ed. 619 (1911)), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980); *see infra* slip op. at 5162, ____

proposition that "if as a result of horizontal market division a company acquires monopoly power, it . . . violates § 2 of the Sherman Act." 665 F.Supp. at 1523 (citing *Grinnell*, 384 U.S. at 576, 86 S.Ct. at 1706–07). Because *Grinnell* involved a government enforcement action, it does not support the application of this rule to the present case, which of course is a private action. The government in *Grinnell* brought suit directly under section 2 and therefore did not need to prove that an injury was causally related to the defendant's conduct. It merely needed to prove an antitrust violation in and of itself. The "willful acquisition" component of *Grinnell* reflects the specifics of that kind of a case: the government could make a case by proving that the defendant had improperly acquired its monopoly power, whether or not the defendant had actually *used* that power anticompetitively to injure a competitor. Thus, the government must prove, under the second prong of the *Grinnell* standard, only that the company with monopoly power acted anticompetitively in a general way. A showing that the company engaged in "the willful acquisition . . . of monopoly power," *Grinnell*, 384 U.S. at 570–71, 86 S.Ct. at 1704, would satisfy that requirement in a case like *Grinnell*.[11]

In a private action under section 2, however, such a showing would not be sufficient to prove liability, unless the company's "willful acquisition" directly caused the plaintiff's injury. In order to satisfy section 4's causation requirement in the present case, therefore, Consolidated would have to show a causal relationship between the

[11]As the passage from *Grinnell* cited by the district court indicates, however, the restrictive agreement in that case was only one of the exclusionary practices supporting the government's case. *See Grinnell*, 384 U.S. at 576, 86 S.Ct. at 1706–07. Whether that agreement, standing alone, would have provided an independent basis for liability even in *Grinnell* remains uncertain.

territorial agreement and its injury.[18] Because Consolidated has made no such showing, nor in my view could it make such a showing, I would reverse the district court's holding that the territorial agreement provided a basis for imposing liability on City Gas under section 2.

IV. MONOPOLY POWER

Putting aside the issue of the territorial agreement, the court today also adopts the district court's holding that City Gas refused to deal in violation of section 2 of the Sherman Act. Again, as the Supreme Court stated in *Grinnell*, 384 U.S. at 570–71, 86 S.Ct. at 1704:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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[18]Even if Consolidated could satisfy the injury requirement with respect to the territorial agreement, I doubt that the agreement would provide a basis for liability *under section 2* of the Sherman Act. As I note above, *see supra* note 15, Consolidated properly characterized the agreement as a "horizontal market division." A horizontal market division can, of course, provide the basis for liability *under section 1* of the Sherman Act. *See, e.g., Topco*, 405 U.S. at 596, 92 S.Ct. at 1126. I have found no support for the proposition that a horizontal market division could also provide a basis for liability *under section 2*. The district court here did not address this point; it merely stated that "a territorial agreement, even between regulated utilities, is a per se violation of the Sherman Act" and concluded that City Gas "has violated § 2 of the Sherman Act." 665 F.Supp. at 1532. In support of this proposition, however, the district court cited three cases in which territorial agreements were held to violate *section 1*, and not *section 2*, of the Sherman Act. These section 1 cases, in my view, do not control in this section 2 case. Thus, the district court's holding that the territorial agreement provided a basis for liability under section 2—even if Consolidated could satisfy the Clayton Act's causation requirement—lacks supporting authority.

The district court held that City Gas' conduct implicated both of these elements and thus constituted an antitrust violation. I first analyze the district court's discussion of City Gas' monopoly power; then, in Part V, I address the district court's discussion of the "willful acquisition or maintenance" element.

The district court held, and the court today agrees, that City Gas possessed monopoly power in both the wholesale and retail natural gas markets. I agree that City Gas had monopoly power in the retail natural gas market; however, I question whether City Gas had monopoly power in the *wholesale* natural gas market. That City Gas had such power in the wholesale market, moreover, is crucial to the theories on which the district court and this court today have based City Gas' antitrust liability.

In conducting its monopoly power analysis, the district court followed the standard approach, first defining the relevant product and geographic markets and then determining whether City Gas possessed monopoly power within those markets. With respect to the relevant product market, the district court restated the Supreme Court's holding in *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 404, 76 S.Ct. 994, 1012, 100 L.Ed. 1264 (1956), that the "market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." 665 F.Supp. at 1516 (quoting *DuPont*). The district court concluded that the relevant product market was limited to natural gas and did not include LP gas because of its prohibitive expense. The district court then defined the relevant geographic market as "the area of effective competition in the known line of commerce . . . in which the seller operates, and to which the purchaser can practicably turn for supplies." *Id.* at 1518 (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L.Ed.2d 580 (1961)). Applying this definition, the district

court concluded that the relevant geographic market was City Gas' service area and was not limited to Consolidated's service area.

The district court next considered whether City Gas possessed monopoly power within this market. The district court defined monopoly power as "the 'power to control prices or exclude competition,'" *id.* at 1519 (quoting *Grinnell*, 384 U.S. at 571, 86 S.Ct. at 1704), and stated that "[f]requently courts have approached the problem by defining first the relevant product and geographic markets and then computing the defendants' market share from this statistical data," *id.* The district court then found that "[i]n the wholesale market, City Gas sold 100% of the natural gas requested for resale in its service area." *Id.* Based on this finding, the district court held that City Gas possessed monopoly power within the wholesale natural gas market. On appeal, the panel adopted this holding as well. *See Consolidated Gas Co. v. City Gas Co.*, 880 F.2d 297, 300–01 (11th Cir.1989).

City Gas has challenged this holding, contending that it could not possibly have monopoly power because it sold *no* wholesale gas whatsoever. Rather, City Gas claims, FGT sells 100% of the gas for resale in the relevant service area. In response to this argument, the panel reasoned that although City Gas had never sold gas for resale, it had *power* to do so and had in fact entered into a contract (in 1965) to supply gas for resale to a retail natural gas distributor named Florida Gas. That contract, however, was abandoned by the parties, and it is undisputed that City Gas never actually sold gas at wholesale—either to Florida Gas or to anyone else. Putting the Florida Gas contract aside for a moment, I first demonstrate in section A that City Gas could not have possessed monopoly power in the relevant market defined by the district court because City Gas never actually operated in that market. I then consider in section B the abandoned contract and conclude that it has no relevance to

the issue of whether City Gas possessed monopoly power in the wholesale market in this case.

A. *The Relevant Market.*

I suggest that the monopoly power issue is more complicated than the district court's analysis reflects. Consider first the complexities of the factual situation here. Consolidated wants gas for resale. FGT supplies gas for resale, but in order to acquire gas from FGT, City Gas must spend $250,000.00 to construct a lateral pipeline and must wait approximately two years for a FERC allocation. City Gas distributes gas at retail but also has the "power" to supply gas for resale to Consolidated. City Gas, however, has never actually sold gas for resale, although it considered doing so and even went as far as entering into a contract to do so (which was subsequently abandoned and never performed, *see infra* slip op. at 5160–5162, ____ - ____). Now, assuming for the moment that Consolidated really did not have the option of obtaining gas from FGT—the cost and delay involved were just too prohibitive—Consolidated must then acquire gas from City Gas or it will be unable to compete. It would seem, therefore, that City Gas has the power to control prices and exclude competition in the relevant market. At least with respect to Consolidated, City Gas does not compete with any other wholesale supplier: City Gas can independently set the wholesale price and restrict (or deny entirely) Consolidated's ability to acquire a wholesale supply. This is exactly the conclusion that the district court reached. This conclusion assumes, however, that City Gas *is* a wholesale gas supplier. We know that City Gas has the power to supply gas at wholesale—the panel emphasized that point—but (as the district court itself found) City Gas has chosen not to exercise that power. It has the potential to sell gas at wholesale, but it simply has not yet undertaken to exercise that potential. In my view, this fact must be addressed before the district court can conclude that City Gas has monopoly power in the wholesale market.

Neither the district court nor the court today has adequately addressed this point, though; nor, in my view, could they do so. The district court has defined a market that simply does not exist. In support of my conclusion, in subsection 1, I first consider a basic but very important issue: what is a market? I then show in subsection 2 that the district court's construction of the relevant market is inconsistent with the basic notion of a market. I focus specifically on the district court's conclusion regarding the relevant geographic market in this case.

1. The Concept of a Market.

Economists hold that a market exists when buyers and sellers exchange goods or services. *See, e.g.*, The MIT Dictionary of Modern Economics 263 (D. Pearce ed. 1986) (market is "any context in which the sale and purchase of goods and services takes place"); J. Hanson, A Dictionary of Economics and Commerce 255 (6th ed. 1986) ("In a wider sense, however, a market can signify any area in which buyers and sellers are in contact with one another. . . ."); *see also* C. Ferguson & J. Gould, Microeconomic Theory 259 (4th ed. 1975).[19] This idea of exchange can also be defined in terms of supply and demand: an exchange can occur if a buyer wants goods or services that a seller can supply. However defined, exchange is a function of price. A buyer's desire to buy and a seller's desire to sell are qualified by price: the parties desire to proceed *only at a certain price, or within a certain range of prices.* Beyond that price, or outside of that range of prices, the parties do not desire to proceed with the transaction at issue. The market, then, is the mechanism by which price is established. The market serves as such a mechanism by providing a history of

[19]These definitions contain a resonance of what a market historically was: a physical location where merchants sold their goods. The definitions, however, use terms of location that are at once more modern and more abstract, referring to "any context" or "any area."

transactions (both complete and incomplete) in the context of which parties negotiate their price.[20]

A market, obviously, exists independently of whether or not a given transaction is completed—i.e., whether the parties agree to a price. A failed transaction merely becomes part of the history that serves as the context for future negotiations. The present case, however, involves something entirely different than a failed transaction in an established market. In the present case, no market existed in which the parties could reach an acceptable price. Neither City Gas nor any other retail distributor in the region has ever sold gas at wholesale to another retail supplier. The parties in this case could refer to no history of transactions (or prices) as a basis for setting a price term for their potential transaction. When the transaction failed in this case, therefore, its failure

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[20]This description would apply as well to the historical market—the physical location where merchants hawk their goods. The mere existence of such a physical market did not guarantee a "market" in the sense of a mechanism for negotiating price. The physical market meant that parties to a potential transaction had a place where they could conduct their negotiations, but it did not necessarily provide the parties with a history of transactions in the context of which they could negotiate a price.

For example, imagine strolling through the agora on a classically beautiful day in ancient Athens. Merchants are selling olives, retsina, and goats. Suddenly, a mysterious looking figure appears in the center of the agora with a creature resembling a goat, but golden in color and with a single, spiral horn rising from the top of its head. The figure announces that this creature is for sale, and a crowd begins to gather. A goatherd, whose interest has been piqued, offers to buy the beast for five drachmas, the going rate for a ram. The mysterious figure laughs and instead offers to sell the unicorn in exchange for the goatherd's entire herd. The goatherd, along with the rest of the crowd, looks at the figure in surprise. Clearly, they have never tried to buy a unicorn before. The figure scans the crowd, but no one attempts another offer. With a sudden wave of his arm, the figure opens a path through the crowd and departs, as quickly as he came.

The historical market, thus, provides a stage for this scene. The history of transactions incorporated in that market, however, are useless as a basis for arriving at a price for a unicorn.

reflected the absence of an established market that could have enabled the parties to negotiate an exchange. The transaction's failure, moreover, meant that no such market came into existence as a result of the transaction. Thus, the absence of a market for the transaction at issue in the present case explains, at least in part, the inability of City Gas and Consolidated to agree to a transaction price. More importantly, the absence of a market—both as a context for the transaction or as a result of the transaction—meant that the district court here could not determine what the transaction price should have been.

Consider a hypothetical situation: in 1970, Senior Partner at a large law firm with a respected antitrust practice strolls into the office of Acme Rocket and Spaceship's President. Acme, of course, built the spacecraft that recently landed on the moon. President greets Senior Partner (they went to college together) and asks him what's on his mind. Senior Partner (who has been billing 3000 hours a year for thirty-five years) tells President that he wants a branch office orbiting the moon and would like Acme to supply a spaceship for that purpose. Senior Partner also indicates that he can find no other company capable of building such a spaceship for him. President says that Acme can do the job, and the two begin to discuss a price. Senior Partner says that his firm will be willing to pay five million dollars. President smiles politely and gently suggests that the required spaceship would cost nearly a billion dollars to design and build. Senior Partner responds that at most his firm could manage to pay ten million. President then says that because Senior Partner is such an old friend, and the publicity from the spaceship would be so good, Acme could build it for half price, or $500 million. Senior Partner says he understands and resigns himself to spending the rest of his career in his two-floor corner office in New York. President claps him on the back, and the two head off to the golf course.

As this negotiation suggests, no "market" for private spaceships existed at the time. True, Senior Partner wanted a spaceship, and Acme could theoretically have built one—that is, a supply and demand existed for private spaceships. But no history of a price existed for such a transaction, and the negotiation obviously failed to establish one. No price existed because no market existed—no mechanism by which the parties to this potential transaction could establish a price. Following the district court's reasoning in the present case, however, one would have to conclude that a market for private spaceships did exist in 1970 and, in addition, that Acme possessed monopoly power in that market. These conclusions are obviously ludicrous, but they necessarily follow from the district court's definition of a market: *potential* demand plus *potential supply*.

2. The District Court's Analysis.

With this discussion of the idea of a market in mind, I now consider the district court's specific conclusions regarding the relevant market in this case. I focus on the district court's analysis of the relevant geographic market. As I discuss above, the district court defined the relevant geographic market as "the area of effective competition in the known line of commerce . . . in which the seller operates, and to which the purchaser can practicably turn for supplies." 665 F.Supp. at 1518 (quoting *Tampa Electric*, 365 U.S. at 327, 81 S.Ct. at 628). This definition consists of two parts: defining the relevant area first in terms of where the seller sells and then in terms of where the purchaser can go to purchase. Both parts emphasize a market's practical realities: with respect to the seller, the inquiry looks to the "area of *effective* competition," and with respect to the purchaser, the inquiry looks to the area where the purchaser "can *practicably* turn for supplies." *Tampa Electric*, 365 U.S. at 327, 81 S .Ct. at 628 (emphasis added).

Two questions arise from the district court's application of this inquiry. First, I question whether a firm could in fact be a "seller" under this definition if the firm does not operate, and has never operated, in the "area of effective competition" at issue. I doubt that a firm can properly be labeled a wholesale "seller" of a product if that firm sells that product only on the retail level. Second, I question whether a firm wanting to purchase supplies at wholesale can "practicably turn" to an entity that does not deal in the product at issue. The district court, however, answered both of these questions in the affirmative, and in so doing developed a new rule of antitrust liability. That is, if given the circumstances of a market, a purchaser can "practicably turn" nowhere for its supplies, then a court is justified to compel another entity, even though it is not in the supply business at issue, to enter that business in order to provide the purchaser with its supplies.

At bottom, this is the principle underlying the district court's analysis of the monopoly power issue in the present case. The district court backed into its holding that City Gas possessed monopoly power after concluding that Consolidated had no other practicable source of supply. Not only is that conclusion itself erroneous, as I discuss below, *see infra* slip op. at 5152–5162, ____ – ____, but as a result of that conclusion, the district court constructed the relevant geographic market so as to cut out FGT—the regional wholesale supplier of natural gas. In my view, a properly constructed wholesale market in this case would necessarily include FGT. The relevant market must include FGT because City Gas is not a "seller" as defined in *Tampa Electric*. Thus, Consolidated could not practicably turn to City Gas for its supply. Without FGT's presence, therefore, no wholesale market would exist. This would be the case, moreover, whether or not Consolidated could practicably turn to FGT for its natural gas supply. As I suggest below, however, the district court erred in concluding that Consolidated could not have done so.

Based on its findings of fact, as I discuss above, the district court concluded that "Consolidated was left with only [one] alternative if it was to remain in business: the purchase of natural gas directly from City Gas." 665 F.Supp. at 1510. The district court reached this conclusion based on considerations of cost, time, and competition. In the district court's view, the $250,000.00 cost of interconnecting to FGT's pipeline posed a substantial barrier to Consolidated's entry into the natural gas market. In addition, until November 1984, Consolidated lacked the FERC allocation necessary to allow it to interconnect with the FGT pipeline at all. Thus, from the fall of 1982 (that is, after the approximately three-to-six-months that approval of the FERC allocation would have required, according to the district court, had City Gas not intervened in the FERC proceedings) until November 1984, Consolidated could have purchased gas only from City Gas. The district court also emphasized the competition between Consolidated and City Gas. When Consolidated decided to convert from LP to natural gas, it was, as the district court put it, "forced to compete with City Gas in order to retain its customers or else see them go to City Gas for more economical gas service." *Id.* at 1505. In the district court's view, as a result of this competition, "it became crucial that Consolidated convert to natural gas for as low a cost as possible in order to be able to offer rates that were competitive with those City Gas could offer." *Id.* at 1506.

The district court then translated these conclusions into a hypothetical relevant market. More specifically, the district court took its findings concerning the conditions necessary to enable Consolidated to compete with City Gas and used them as a basis for constructing a relevant (but hypothetical) market. The district court's effort in constructing this market, however, was propelled by the assumption that Consolidated was entitled to compete. Driven by this assumption, the district court disregarded as features of the market some of the very conditions stipulated

by its findings—namely, the entry barriers in terms of time, cost, and competition.

Rather than structuring a hypothetical market according to the terms that would be necessary to enable Consolidated to compete on equal footing with firms already operating in that market, the district court should have examined the structure of the market as it actually existed (entry barriers and all). Based on that structure, the district court should then have analyzed whether City Gas actually possessed monopoly power and whether it had in fact used that power to prevent Consolidated from competing. The focus of the antitrust laws is to prevent anticompetitive conduct by monopolists, but not to enable an entity to compete whether or not a monopolist acts anticompetitively. The antitrust laws are designed to create an equal *opportunity* for competition, *see Charles A. Ramsay Co. v. Associated Bill Posters of United States & Canada*, 260 U.S. 501, 512, 43 S.Ct. 167, 168, 67 L.Ed. 368 (1923); they do not create an absolute entitlement to compete successfully. Given this distinction, we must be very careful here in ascribing to City Gas responsibility for the entrance barriers to the *retail* natural gas business. If those entry barriers (in terms of time, cost, and competition) are simply too high to enable Consolidated to compete (independent of whether City Gas possessed monopoly power or has used that power anticompetitively), then the district court cannot mandate that City Gas underwrite Consolidated's entry into the retail natural gas market, especially when that mandate would require City Gas to undertake a new level of operation and limit its own legitimate opportunities for expansion.

As it actually exists, then, the relevant geographic market, or "the area of effective competition in the known line of commerce . . . in which the seller operates, and to which the purchaser can practicably turn for supplies," 665 F.Supp. at 1518 (quoting *Tampa Electric*, 365 U.S. at 327, 81 S.Ct. at 628), necessarily included FGT's pipeline. In a case

such as this one, where entities exist that are actually engaged in the "line of commerce" at issue, the district court erred in holding that the "effective competition in the known line of commerce . . . in which the seller operates" consisted of another entity that was not actually engaged in that "line of commerce" even if that entity could hypothetically be engaged in such commerce and even if that entity would provide the antitrust plaintiff with the most economically feasible supply.

As this discussion demonstrates, therefore, the district court's finding that City Gas possessed a 100% share of this market is clearly erroneous. Because the district court misconceived the nature of the relevant market, its finding regarding City Gas' share of that market is meaningless. Within the actual wholesale market, FGT clearly possessed the inordinate share, and City Gas possessed virtually none, if any at all.

In addition, the district court erred in concluding that Consolidated could not "practicably" have turned to FGT for its supply. The district court, as I discuss in detail above, *see supra* slip op. at 5146–5148, ____ - ____, made three findings on this point: (1) the FERC proceedings, which resulted in an order granting Consolidated's request for an allocation to interconnect to FGT's pipeline, lasted approximately twenty-eight months; (2) construction of the interconnection would cost Consolidated $250,000; and (3) Consolidated would have to compete with City Gas. These findings, however, do not support the conclusion that Consolidated could not practicably have turned to FGT for a wholesale gas supply. Taking these same factors into account, the FERC order issued September 19, 1984, which granted the allocation, held that FGT was "the applicant's most feasible source of supply."[21] As the district court itself

[21]That criterion must be satisfied before the FERC can order an allocation under Section 7(a) of the Natural Gas Act, 15 U.S.C. §717f(a)

(Footnote continued on next page)

restated, the FERC order opined that, although competition with City Gas would be difficult, Consolidated's entry into the natural gas distribution market—with FGT as its supplier—was economically feasible. When FERC issued its order, the delay in gaining approval of the allocation had already occurred. Similarly, City Gas had already placed itself in a strong competitive position; indeed, City Gas had accomplished that well before Consolidated even began its conversion to natural gas. Thus, from Consolidated's perspective, the only practical difference between turning to FGT as opposed to City Gas for a wholesale gas supply was that the first option would cost Consolidated an additional $250,000 more than the second option.

The record on appeal in this case further indicates that, in light of Consolidated's assets and its projected profits and business opportunities, it was economically feasible for Consolidated to cover the $250,000.00 expense of interconnecting to FGT's pipeline. I test this conclusion by considering whether, given the evidence Consolidated presented at trial concerning its expected future profits as a natural gas company with a supply of gas, Consolidated could feasibly have obtained underwriting for a bond issuance in the amount of $250,000 in order to fund the cost of hooking up to FGT. At trial, Consolidated called an expert witness, Ben Ball, to the stand to render an opinion regarding the company's present value with a natural gas supply. This value was, in effect, what a willing buyer, fully informed of all relevant facts, would pay a willing seller, also so informed. Ball assumed that Consolidated could indefinitely obtain a "competitively priced source of natural gas," 665 F.Supp. at 1514, and could continue to operate

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(Footnote continued from previous page)
(1988), which requires that the allocation be "necessary or desirable in the public interest" standard.

profitably, with that supply of gas, for twenty years.[22] He then estimated Consolidated's annual profits for that period, including profits that it would have made by servicing former customers that had been captured by City Gas. From those profits, he deducted the expenses that Consolidated would have incurred in transforming its operation to natural gas distribution; this deduction included the approximately $20,000 cost of hooking up to City Gas' pipesystem. Ball assumed that the hypothetical buyer would expect a ten-percent return on its investment, and, using this rate, he found the present value of the projected stream of profits over the twenty-year period: the figure was $2,275,130. *Id.* at 1515. From these figures, it follows that Consolidated would generate annual profits of approximately $267,000 (i.e., a willing buyer would pay $2,275,130, at a ten-percent interest rate, for a twenty-year annuity paying $267,000 a year).[23]

Now, assume that Consolidated issues a $250,000 bond, to mature in twenty years, and pays interest at a high rate, say fifteen percent annually. Given that rate, Consolidated's nominal annual interest payments would be $37,500. Because Consolidated could deduct those interest payments from its taxes—paid at a corporate rate of thirty-four percent, *see* I.R.C. § 11(b)(1) (1988)—its real interest expense would be $24,750 annually. After paying this amount (which would represent a mere 9.3% of Consolidated's annual profits of $267,000), Consolidated would still generate

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[22]Ball based his "competitively priced source of gas" figure on the price City Gas paid for wholesale gas from FGT. As I discuss below, *see infra* notes 60–61 & accompanying text, that figure provided an improper basis for calculating Consolidated's future profits *if Consolidated purchased gas from City Gas*. These figures, on the other hand, would provide a proper basis for calculating Consolidated's future profits *if Consolidated purchased gas from FGT*, which is the focus of my discussion here.

[23]The source of these and other present-value figures in this opinion is L. Gitman, Principles of Managerial Finance app. A, tbl. A–4 (3d ed. 1982).

annual profits in the amount of $242,250, and its present value as a company generating $242,250 in annual profits over the next twenty years (assuming a ten-percent interest rate) would be roughly $2,060,000. In addition, given the amount of its projected future profits, one would expect Consolidated to have little difficulty in paying back $250,000 in principal at the end of twenty years.

As these figures suggest, a reasonable underwriter would obviously have found these hypothetical bonds to be a safe investment and would have underwritten them. Consolidated, therefore, could have "practicably turned" to FGT for a supply of wholesale gas. As a result, the district court erred in excluding FGT from the relevant geographic market, and if FGT had been included in the relevant market the district court obviously could not have held that City Gas possessed monopoly power in that market, even if City Gas did sell at wholesale. The fact remains, however, that City Gas never sold natural gas at wholesale. In essence, then, the issue whether Consolidated could practicably have purchased wholesale gas from FGT is irrelevant to this case. Whatever sources Consolidated may or may not have found, City Gas was not one of them. City Gas simply did not participate in the relevant market.

B. *The Florida Gas Contract.*

In addition, City Gas' contract with Florida Gas has no significance for the issue of monopoly power. To begin with, the contract was abandoned, and City Gas never performed. The panel acknowledged that "City Gas never actually sold any gas under this agreement" but stressed that "it had the *power* to do so." 880 F.2d at 301 (emphasis in original). I agree. The fact that City Gas had the *power* to sell at wholesale, however, does not mean that it had monopoly power in the wholesale market, that it was actually in the wholesale market, or that a wholesale market even existed. The abandoned contract has no relevance to these issues. On

the contrary, the fact that the contract was abandoned, as the district court agreed, indicates that City Gas never actually sold at wholesale, choosing for whatever reason not to exercise its hypothetical power in the wholesale market. In my view, that is the significant point: that City Gas *legitimately decided not to exercise* its power—not selling to Consolidated, to Florida Gas, or to any other firm. Pursuant to this decision, City Gas did not operate as a wholesale natural gas supplier.

In addition, the abandoned contract provided no evidence that the wholesale market, as defined by the district court, was anything more than hypothetical. As I discuss above, *see supra* slip op. at 5154–5156, ____ - ____, a market is a mechanism for establishing price; a wholesale price, therefore, provides evidence that a wholesale market exists for a given product in a given geographical area. Thus, the Florida Gas contract could provide evidence that a wholesale natural gas market existed only if the contract contained a reliable price term. If the contract did not contain a reliable price term, then it could provide no evidence that the parties to the contract were able to negotiate a price term—i.e., that a market existed. I suggest that the district court in this case implicitly found that the contract did not contain a reliable price term. That is, the district court did not look to the price term in this contract as a basis for deciding that the price that City Gas quoted to Consolidated was unreasonable, thus constituting a refusal to deal, or as a basis for setting the price at which City Gas had to sell to Consolidated as ordered in the district court's injunction. In fact, the district court never decided what a reasonable price would be in the present case and instead delegated to the FPSC the task of setting a price for the forced sale. *Id.* at 1512, 1534, 1545. The district court, therefore, could not have had much confidence in the price term set in City Gas' contract with Florida Gas. And this is not surprising, given that the contract was abandoned. Because the contract did not contain a reliable price term,

therefore, it could not provide evidence that a wholesale market actually existed—let alone that City Gas operated in that market.

Even if the district court found that the contract did contain a reliable price term, indeed even if City Gas had actually performed under the contract, in my view the contract would still be irrelevant to the issue whether City Gas possessed monopoly power in the relevant market. City Gas' transaction with Florida Gas would not have occurred in the relevant geographic market, accepting for the sake of discussion the district court's definition of that market here.

The district court found that the relevant geographic market consisted of City Gas' service area, Consolidated's service area, and unserved portions of southwest Dade County. 665 F.Supp. at 1518–19. Thus, the district court defined the relevant area in terms of where Consolidated could look for its gas supply and where it could look to distribute that gas. The compatible area in Florida Gas' case would be totally different. Florida Gas operated in a different area of Dade County than the area in which Consolidated operated, and Florida Gas did not look to expand into southwest Dade County as did Consolidated. The only area of overlap between the geographic areas involved in the Florida Gas contract and in the present case would be City Gas' service area. Even that area, however, differs in the two situations. The contract with Florida Gas dates back to 1965; Consolidated did not begin its efforts to enter the natural gas business until 1982. Between 1965 and 1982, City Gas' service area changed significantly. As the district court itself emphasized, the size of that service area is an important factor in defining the relevant geographic market:

> the relevant geographic market should encompass all of the service area City Gas serves. . . . The effects of demand and cost are spread throughout City Gas' service area through the rate regulation process. Thus,

> City Gas can cross-subsidize prices or costs in any one part of its territory with revenues earned in the rest of its service area.

665 F.Supp. at 1518. For purposes of establishing the relevant geographic market, therefore, City Gas' service area *in 1982* had no relation to its service area *in 1965* at the time of the Florida Gas contract.

Even applying the factors used by the district court to define the relevant geographic market in the present case, it is apparent that the relevant geographic market for the Florida Gas contract was entirely different. Even if the parties had not abandoned that contract, it would have been performed in a different relevant market than the one involved here and therefore would have had no bearing on the question whether City Gas operated in the relevant market, let alone possessed monopoly power in that market.

For these reasons, in my view, the district court erred in holding that City Gas possessed monopoly power in the wholesale natural gas market.

V. LIABILITY UNDER SECTION 2

A. *Legal background.*

Section 2 of the Sherman Act provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. . . ." 15 U.S.C. § 2 (1988). As the Supreme Court has stated:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570–71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966). In order to violate section 2, therefore, the monopolist must possess monopoly power and must also use that power anticompetitively. Section 2 does not prohibit the possession of monopoly power in and of itself—of "monopoly in the concrete." *Standard Oil Co. v. United States*, 221 U.S. 1, 62, 31 S.Ct. 502, 516, 55 L.Ed. 619 (1911); *see Byars v. Bluff City News Co.*, 609 F.2d 843, 853 (6th Cir.1979); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir.1979) (citing *Standard Oil*), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980).

In *United States v. Griffith*, the Supreme Court addressed the requirement of anticompetitive conduct and characterized it as "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor." 334 U.S. 100, 107, 68 S.Ct. 941, 945, 92 L.Ed. 1236 (1948). In determining what conduct falls into this category, the idea of intent has always been central. As the Court stated in *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919): "[i]n the absence of any *purpose* to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engagef in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." (Emphasis added.) The Court also emphasized the importance of intent in *Griffith*, when it indicated that mere possession of monopoly power could "itself [be] a violation of § 2, provided it is coupled with *the purpose or intent* to exercise that power" to foreclose competition. 334 U.S. at 107, 68 S.Ct. at 945 (emphasis added).

As the Court has recognized, however, "no monopolist monopolizes unconscious of what he is doing." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 n.

28, 105 S.Ct. 2847, 2857 n. 28, 86 L.Ed.2d 467 (1985) (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir.1945) (L. Hand, J.)). The effects of a defendant's conduct on competitors and, more importantly, on consumers and on competition in general are also important factors in evaluating whether the conduct at issue is anticompetitive. *See id.* at 605, 105 S.Ct. at 2858–59. This point merely suggests that, as an evidentiary matter, "the requisite intent [under section 2] can be inferred if a defendant maintains his power by conscious and willful business policies, however legal, that inevitably result in the exclusion or limitation of actual or potential competition." *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 990 (D.C.Cir. 1977) (citing *Aluminum Co.*, 148 F.2d at 428–31), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978).

A primary type of anticompetitive conduct in section 2 cases—and the type of conduct at issue here—is a defendant's refusal to deal with a competitor or potential competitor. Such refusals to deal fall into one of two general categories. One category involves monopoly leveraging. Monopoly leveraging occurs when a vertically integrated monopolist—i.e., a monopolist that operates on several levels of the market—uses its monopoly power on one level of the market to gain a competitive advantage on another level of the market.[24] For example, in *United States v. Terminal R.R. Assoc.*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912), a group of railroads servicing the St. Louis area also owned the only railroad terminal that provided access to the city. The terminal owners used their monopoly power over the terminal to overcharge other railroads for access to the terminal and thereby to gain a competitive advantage in the downstream market for railroad service in St. Louis. The

[24]Monopoly leveraging also refers to a monopolist's conduct in attempting to integrate vertically, by using its established monopoly power (on a given level of the market) to leverage its way into another level of the market.

majority of refusal-to-deal cases under section 2 fall into this monopoly-leveraging category. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927); *Terminal R.R.*, 224 U.S. at 383, 32 S.Ct. at 507; *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir.1986); *Olympia Equip. Leasing Co. v. Western Union Tele. Co.*, 797 F.2d 370 (7th Cir.1986), *cert. denied*, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1987); *Catlin v. Washington Energy Co.*, 791 F.2d 1343 (9th Cir.1986); *Paschall v. Kansas City Star Co.*, 727 F.2d 692 (8th Cir.), *cert. denied*, 469 U.S. 872, 105 S.Ct. 222, 83 L.Ed.2d 152 (1984); *MCI Communications Corp. v. AT & T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983); *Byars*, 609 F.2d at 843; *Berkey Photo*, 603 F.2d at 263; *Hecht*, 570 F.2d at 982; *Poster Exch., Inc. v. National Screen Serv. Corp.*, 431 F.2d 334 (5th Cir.1970), *cert. denied*, 401 U.S. 912, 91 S.Ct. 880, 27 L.Ed.2d 811 (1971).

The second category of refusal-to-deal cases under section 2 does not involve monopoly leveraging, but rather involves a monopolist's use of its monopoly power on one level of the market to maintain or expand its power on that same level of the market. For example, in *Lorain Journal Co. v. United States*, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951), a single newspaper in a small town had a monopoly over the newspaper advertising business in that town. When a local radio station began to sell radio advertising, the newspaper refused to sell advertising space to anyone also advertising on the radio. The newspaper thus anticompetitively used its monopoly power on one level of the market to maintain its power on that same level by preventing the radio from competing for advertisements. Although the majority of section 2 cases fall into the first category, some important cases are of this second type. *See, e.g., Aspen*, 471 U.S. at 585, 105 S.Ct. at 2847; *Lorain*

Journal, 342 U.S. at 143, 72 S.Ct. at 181; *Official Airline Guides, Inc. v. Federal Trade Commission*, 630 F.2d 920 (2d Cir.1980), *cert. denied*, 450 U.S. 917, 101 S.Ct. 1362, 67 L.Ed.2d 343 (1981).

The key to both categories of refusal-to-deal cases—whether they involve monopoly leveraging or exercises of monopoly power on a single level of the market—is that the circumstances surrounding the refusal to deal must give rise to an inference of anticompetitive intent. Intent is rarely established by direct evidence; almost invariably, it is established by circumstantial evidence: the nature of the defendant's conduct and its effect on competition in the market demonstrate that the defendant intended to foreclose competition in the relevant market. In order to decide whether a refusal to deal of either type constitutes anticompetitive conduct under section 2, courts have developed two formulas for analyzing the circumstantial evidence in a given case: (1) the "essential facilities doctrine" and (2) the "intent test." These formulas aid the court in weighing and evaluating the circumstantial evidence in a given case to determine whether that evidence yields an inference of an intent to foreclose competition.

The first formula, the essential facilities doctrine, holds that an antitrust defendant may have acted anticompetitively if the circumstances of a case satisfy a four-part test: (1) the defendant is a monopolist in control of a facility or resource that is essential to a competitor's operation; (2) the facility or resource cannot practically or reasonably be duplicated by competitors; (3) the monopolist refuses to deal with competitors; and (4) the monopolist could feasibly deal with competitors. *See MCI*, 708 F.2d at 1081; *Hecht*, 570 F.2d at 982. If the four elements of this standard are satisfied, an inference of the defendant's anticompetitive intent may arise and thus justify the imposition of liability under section 2.

The second formula, the intent test, directly addresses the issue of intent by evaluating the monopolist's conduct and determining whether, under the circumstances of the case, the conduct at issue demonstrates an illegal intent to destroy competition. If the conduct gives rise to an inference of anticompetitive intent, then the monopolist is subject to liability under section 2. *See Lorain Journal*, 342 U.S. at 152–53, 72 S.Ct. at 186; *Eastman Kodak*, 273 U.S. at 375, 47 S.Ct. at 404; *MCI*, 708 F.2d at 1148–49; *Poster Exchange*, 431 F.2d at 339–40.

In defining the character and limits of these tests, it is essential to understand their function as mechanisms for evaluating circumstantial evidence to determine whether the defendant acted—i.e., refused to deal—with an anticompetitive intent. The tests have validity only to the extent that they enable such a determination. Even if a court, for example, could mechanically apply the elements of the essential facilities doctrine to a given case, if that application would not support an inference of anticompetitive intent, then the test would not justify the imposition of liability under section 2. Indeed, as an analysis of the essential facilities cases demonstrates, liability in those cases is supported by more than the mechanical application of the doctrine's four-part test. The cases all possess certain features (beyond the test's four elements) that support an inference of anticompetitive intent.

One primary feature of the essential facilities cases is that they all involve monopoly leveraging. *See, e.g., Otter Tail*, 410 U.S. at 366, 93 S.Ct. at 1022; *Associated Press*, 326 U.S. at 1, 65 S.Ct. at 1416; *Terminal R.R.*, 224 U.S. at 383, 32 S.Ct. at 507; *Fishman*, 807 F.2d at 520; MCI, 708 F.2d at 1081; *Byars*, 609 F.2d at 843; *Berkey*, 603 F.2d at 263; *Hecht*, 570 F.2d at 982.[25] In fact, the courts in these cases, after

[25]*But see Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir.1984), *aff'd*, 472 U.S. at 585, 105 S.Ct. at 2847. The

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stating the four elements of the doctrine, generally explain that the doctrine's underlying rationale is a concern about monopoly leveraging. The MCI court, for example, after describing the four-part test, stated that "[s]uch a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market into another." 708 F.2d at 1132.

Another distinguishing feature of the essential facilities cases is that, before the defendant refused to deal with the firm at issue, the defendant was already engaged in the business of providing the service at issue or access to the facility at issue, either to the refused firm itself or to other, similarly situated firms. Thus, in refusing to deal with a given firm, the defendant discriminates between customers. That discrimination, moreover, has an anticompetitive motivation. For example, in *Terminal R.R.*, the terminal owners were in the business of providing railroads with access to the terminal. The terminal owners allowed railroads that did not compete in St. Louis to use the facility at a non-extortionate charge. The terminal owners, however, allowed railroads that *did* compete in St. Louis to use that facility only at extortionate rates.

Because essential facilities cases generally involve these two features—monopoly leveraging and discrimination—the four elements of the doctrine merely provide a shorthand formula for inferring the presence of anticompetitive intent when the circumstances of a case follow a certain pattern. When the case does not follow that pattern and does not

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Tenth Circuit there applied the essential facilities doctrine to a refusal to deal that did not involve monopoly leveraging. *See infra* slip op. at 5186–5189, ____ – ____, for a discussion of the case. In affirming the Tenth Circuit, however, the Supreme Court did not analyze the case under the essential facilities doctrine. In my view, this case is not properly classified as an essential facilities case.

involve those same features, however, the essential facilities doctrine is not a reliable means of analysis.[26]

The monopoly-leveraging feature of these cases, moreover, is itself such a powerful indication of anticompetitive intent that courts have frequently held it to be a sufficient basis, independent of the essential facilities doctrine, for imposing liability under section 2. *See, e.g., Otter Tail*, 410 U.S. at 366, 93 S.Ct. at 1022; *Eastman Kodak*, 273 U.S. at 359, 47 S.Ct. at 400; *Olympia*, 797 F.2d at 370; *Catlin*, 791 F.2d at 1343; *Paschall*, 727 F.2d at 692; *Berkey*, 603 F.2d at 263; *Poster Exchange*, 431 F.2d at 334. These courts thus refer to the "monopoly-leveraging theory" as a third formula for evaluating anticompetitive intent.[27] Of course, the rationale for imposing liability in these cases is the same as the principal rationale for imposing liability under the essential facilities doctrine: a monopolist's extension of power from one stage of the market into another provides a strong indication of anticompetitive intent and thus justifies the imposition of liability under section 2. The cases applying this "monopoly-leveraging theory" could also be characterized as "intent test" cases: they merely hold that the conduct of monopoly leveraging is sufficient evidence of an illegal intent to justify the

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[26]As Areeda and Hovenkamp note, the essential facilities doctrine can be mechanically applied to a broad range of situations: "the 'essential facility' is just an epithet describing the monopolist's situation: he possesses something the plaintiff wants. It is not an independent tool of analysis but only a label—a label that beguiles some commentators and courts into pronouncing a duty to deal without analyzing the implications. . . ." P. Areeda & H. Hovenkamp, Antitrust Law, ¶ 736.1a, at 701 (Supp. 1989).

[27]To briefly summarize the terminology, refusal to deal cases under section 2 involve two types of conduct, either monopoly leveraging or non-monopoly leveraging. Courts have developed a variety of formulas for analyzing the circumstantial evidence in these refusal-to-deal cases in order to determine whether the evidence gives rise to an inference of anticompetitive intent. These formulas include the essential facilities doctrine, the intent test, and the monopoly-leveraging theory.

imposition of liability under section 2. Indeed, some of these cases—such as *Eastman Kodak* and *Poster Exchange*—are generally cited in connection with the intent test.

The so-called "intent test" also provides an appropriate analytical tool in refusal-to-deal cases that do not involve monopoly leveraging and to which the essential facilities doctrine does not apply. In these cases, a monopolist with monopoly power in one level of a market refuses to deal with a competitor or potential competitor in order to gain a competitive advantage in that same market rather than in another level of the market. Under the intent test, a court can infer an anticompetitive intent from such conduct if, for example, the conduct represents a significant departure from the monopolist's normal pattern of business. That was the case in *Lorain Journal*, 342 U.S. at 148–50, 72 S.Ct. at 183–84, where a newspaper in the business of selling advertising refused to sell advertising space to certain customers; it was also the case in *Aspen*, 472 U.S. at 589–93, 105 S.Ct. 2850–52, where an owner of a several ski areas in Aspen decided no longer to participate in an all-Aspen ski ticket after years of participating in the ticket. Because the intent test, like the essential facilities doctrine, is nothing more than a means of evaluating circumstantial evidence, however, it justifies the imposition of liability under section 2 only when, under the circumstances of the case, an anticompetitive intent is clearly inferable.

In the following sections, I analyze the present case under this general legal framework. In my view, City Gas' conduct did not constitute an antitrust violation under section 2. As I discuss in section B, this case is not a monopoly-leveraging case: City Gas is simply not a vertically integrated company; it operates only on one level of the natural gas market and has never attempted to extend its operation into another level of that market. For this reason, in section C, I distinguish the present case from the line of

cases in which courts have imposed section 2 liability under the monopoly-leveraging theory.

In section D, I then discuss the essential facilities doctrine, which does not apply to the present case either. In subsection 1, I assume for the sake of discussion that the essential facilities doctrine could apply to the present category of case, but show that the doctrine's four-part test would still not be satisfied under the circumstances here. In subsection 2, I show that the doctrine does not properly apply to the present type of case. To that end, I analyze the early Supreme Court cases on which the doctrine is based and then discuss the characteristics and limits of the doctrine as developed in those cases. On that basis, I conclude that this case is not an essential facilities case.

In section E, I analyze the case under the intent test. I first examine the Supreme Court's decision in *Lorain Journal* and discuss the characteristics and limits of the so-called intent test as it derives from that case. I then demonstrate that this theory is inapplicable to the present case.

In section F, I address two more recent Supreme Court cases—*Aspen* and *Otter Tail*—on which the district court heavily relied in the present case. Although neither of these cases expressly applies either the essential facilities doctrine or the intent test, they are still understandable in the context of the preceding sections' discussion. As I show, moreover, neither case justifies the imposition of liability here.

Finally in section G, I consider the Seventh Circuit's decision in *MCI*, which the district court also used as a basis for liability here. Although one holding in *MCI* (on which the district court, and the panel, relied) does not apply, another holding of the *MCI* case does control, and under that holding, City Gas' conduct does not constitute a violation of section 2.

B. *Vertical Integration.*

Before addressing the issue of liability under section 2, I pause to discuss the concept of vertical integration, which underlies the idea of monopoly leveraging. On the subject of vertical integration, Areeda and Turner have this to say:

> Vertical integration, simply put, is the inclusion within a single firm of two or more stages in the production and distribution of an end-product. A firm integrates "upstream" or "backward" when it undertakes to produce raw materials or semi-fabricated components which have been or could be supplied by independent producers. A firm integrates "downstream" or "forward" when it undertakes further processing or distribution of products which have been or could be sold to independent producers or distributors.

3 P. Areeda & D. Turner, Antitrust Law ¶ 723 (1978). According to this definition, I cannot conceive of City Gas as a vertically integrated company. The natural gas business involves a relatively simple technology. At the far end of the production stream, natural gas reserves are located, and the gas is pumped from the ground. The natural gas is then transported through interstate pipelines from the reserves to new areas for distribution. Once the natural gas reaches these distribution areas, it is transferred to local pipesystems, which move the gas from the pipelines to the customers and thereby supply the gas on a retail level. Thus, three levels of operation exist in the natural gas business: (1) drilling gas, (2) transporting the gas for resale, and (3) supplying the gas to customers at retail. In the present case, City Gas is involved solely in the third level of operation—supplying gas at retail. City Gas is therefore not a vertically integrated company.[28]

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[28] I have discussed in detail above the irrelevance of City Gas' abandoned contract with Florida Gas. *See supra* slip op. at 5160–5162, ——– ——.

Even if City Gas on occasion had actually sold natural gas at wholesale to other retail distributors, I question whether that would have constituted vertical integration into another level of operation. Given FGT's predominance in the wholesale market, City Gas' participation in that market would have lacked antitrust significance: City Gas would still have lacked the market power to act anticompetitively under section 2. *See supra* slip op. at 5152–5162, ____ - ____. In addition, the sale of some surplus gas by one natural gas retail supplier to another retail supplier would hardly constitute an integration by the first supplier into an upstream market. In my view, one could not seriously contend that City Gas' potential sales of its surplus gas to another retail supplier would constitute integration into the second level of the market—the interstate transportation level on which FGT operates. Clearly, City Gas would in no way displace FGT's operation; on the contrary, all of the gas involved in City Gas' trade would still come from FGT. If City Gas' potential sales of gas for resale constituted vertical integration, the integration would have to occur on a sublevel of the retail distribution level of the market.

Although integration into such a sublevel could theoretically occur, practically it could not. Any potential sublevels of the supply operation would be so interrelated with each other that it would not be reasonable to consider them as severable. *See, e.g ., Berkey Photo*, 603 F.2d at 276–79 (describing features of "integrated firm"). Although a retail distributor generally has its own pipesystem, which picks up a supply of natural gas from a wholesale source and then distributes it to retail customers, the distribution at the back end of this process is not severable from the supply process at the front end of the operation. In order to distribute gas to customers, a retail distributor must have a pipesystem, and the pipesystem must have gas in it. Thus, the pipesystem must connect with a source of natural gas. Variations in the nature of the source, the size of the

pipesystem, or even the character of the customers do not, I suggest, alter the degree of vertical integration of a retail (whether wholly retail or merely predominately retail) supplier of natural gas. In terms of the level of vertical integration, City Gas' operation is identical to what Consolidated's operation would (hypothetically) be. Both companies would possess pipesystems that distribute natural gas from a supply source to their customers. In my view, neither the fact that Consolidated's source might have been City Gas rather than FGT nor the fact that one of City Gas' customers might have been Consolidated is of any significance on the issue of vertical integration.

Because these two companies would be engaged in identical operations, integrated to the same degree and operating at the same levels of the market, this case is fundamentally different from the monopoly-leveraging cases to which the district court analogized the present case. City Gas is simply not using its power as a monopolist on one level of a market to expand its operation into, maintain its monopoly in, or force out competition from another level of the market. City Gas is doing nothing more than competing—legitimately and successfully—with Consolidated for more business in the retail natural gas market. City Gas has been successful for a variety of reasons: it was bigger, it had been in business longer, it had better resources (i.e., a hook up to FGT's pipeline), it implemented an aggressive marketing strategy, and its prices were lower. In short, City Gas could provide customers with better service than Consolidated. We might say, with the benefit of hindsight, that as a result of a series of historical accidents, Consolidated missed the boat years back when it failed to get into the natural gas supply business. None of this, however, means that the antitrust laws impose a duty on City Gas to deal with Consolidated. I discuss why in the following sections.

C. *The Monopoly-Leveraging Theory.*

I first consider the line of cases stemming from *Eastman Kodak*, 273 U.S. at 359, 47 S.Ct. at 400, which holds that monopoly leveraging—a monopolist's attempt to use its monopoly power on one level of the market to gain a competitive advantage on another level of the market—is evidence of anticompetitive intent and constitutes a violation of section 2. The present case, however, as I discuss in the above section, does not involve monopoly leveraging: City Gas' conduct implicated only the retail level of the natural gas market. This line of cases therefore provides no basis here for imposing liability under section 2.

In *Eastman Kodak*, the plaintiff operated a stock house for photographic supplies in Atlanta, Georgia. Kodak supplied the plaintiff, and other stock houses in the area, with wholesale photographic supplies. Kodak, however, itself began to purchase stock houses, expanding its operation from the wholesale level into the retail level as well. By 1910, Kodak had acquired control of all stock houses in Atlanta but the plaintiff's, and, at that point, Kodak refused to sell the plaintiff supplies at wholesale prices. In evaluating the situation, the Court stated:

> [A]lthough there was no direct evidence—as there could not well be—that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purpose, as a matter of just and reasonable inference, to warrant the submission of this question to the jury.

273 U.S. at 375, 47 S.Ct. at 404.

Similarly, in *Poster Exchange*, 431 F.2d at 334,[29] a frequently cited case decided by our predecessor court, a vertically integrated producer/distributor of motion-picture advertising accessories refused to supply a local distributor. The district court held that the defendant "intentionally used the monopoly power it had at the manufacturing level to eliminate [the plaintiff] as a competitor at the distributor-jobber level." *Id.* at 339. Applying *Eastman Kodak*, the district court held that this use of monopoly "power at one level to drive out competition at another" constituted a violation of section 2. *Id.*

The present case simply does not fit this factual pattern. City Gas possesses monopoly power as a natural gas supplier at the retail level. It does not possess monopoly power on the wholesale level; nor does it operate on that level. City Gas, moreover, has never used its monopoly power on the retail level in order to leverage its way into another level of the market. Rather, if City Gas has used its monopoly power at all in this case, then it has used that power only with respect to the retail distribution market for natural gas. Given these circumstances, *Eastman Kodak* and its progeny do not control here: those monopoly-leveraging cases justify no inference under the present circumstances of a "purpose to monopolize," *Eastman Kodak*, 273 U.S. at 375, 47 S.Ct. at 404.[30] Nor do the so-called "essential facilities" cases, which I discuss in the next section, justify such an inference here.

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[29]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[30]As I discuss below, *see infra* part VI, the present case also involves difficulties in fashioning a remedy that do not arise in these monopoly-leveraging cases. In these cases, the defendants were already engaged in providing the service at issue: Kodak sold photographic supplies at wholesale; National Screen sold movie advertising accessories at wholesale. Here, City Gas never sold gas at wholesale to anyone. In fashioning a remedy, therefore, the district court could look to no price

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D. *Essential Facilities Doctrine.*

As the district court stated, "the essential facilities doctrine teaches that, when a business controls a scarce facility, it assumes an obligation to provide its competitors reasonable access to that facility." 665 F.Supp. at 1532 (citing *Byars*, 609 F.2d at 856). The rationale behind this doctrine, as the district court noted, is that "[a] refusal to deal in this context may be unlawful because it could result in the monopolist extending its power vertically from one level of production to another." *Id.* at 1532–33. With this qualification in mind, the district court then articulated the four-part standard for applying the doctrine:

> The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Id. at 1533 (quoting *MCI*, 708 F.2d at 1132–33).

This test must be understood for what it is: merely a mechanism for evaluating the circumstantial evidence in a given case to determine whether that evidence yields an inference of the defendant's anticompetitive intent. Before considering in subsection 2 the limits of this doctrine as a means of evaluating circumstantial evidence, I first examine in subsection 1 the district court's application of the test to the present case. In my view, that application is erroneous in and of itself.

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established by City Gas for the transaction at issue. The district court instead had to set its own price (a task it delegated to the FPSC). That task presents a set of complications that I explore below. Regarding these problems, however, the monopoly-leveraging cases provide no guidance.

1. The District Court's Analysis.

Applying this test to the present case, the district court concluded that all four elements were satisfied and thus held that City Gas was liable under section 2 for refusing to deal with Consolidated. *See id.* at 1534–35. The district court first held that "City Gas, a monopolist, controlled an essential facility—a pipeline that transported wholesale gas." *Id.* at 1534. Under the second element of the test, the district court held that duplication by Consolidated of City Gas' facility—the lateral pipe connecting City Gas' pipesystem to FGT's pipeline—would be "unreasonable 'due to regulatory restriction, and delays, and the expense and time required.' " *Id.* (quoting *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1521 (10th Cir. 1984), *aff'd*, 472 U.S. at 585, 105 S.Ct. at 2847). Applying the third part of the test, the district court noted that City Gas had offered to sell gas to Consolidated for ten cents per therm over cost (City Gas' cost of purchasing gas at wholesale from FGT), which the district court held "essentially amounted to a refusal to deal at all." *Id.* Finally, under the fourth part of the test, the district court held that City Gas could feasibly have sold wholesale gas to Consolidated.

In my view, the district court misapplied the doctrine. First, as I discuss above, *see supra* slip op. at 5152–5162, ____ – ____, City Gas is not a monopolist in the wholesale market. Second, the facility under City Gas' control is not properly labeled "essential" under the doctrine. Third, Consolidated could practically and reasonably have duplicated City Gas' lateral connection to FGT's pipeline. Fourth, the district court improperly held that City Gas' offered price constituted a refusal to deal. I address these points in turn.

The district court based its application of the essential facilities doctrine on the following factual findings. Before Consolidated received its FERC allocation in 1984, Consolidated could have purchased gas for resale only from

City Gas. After 1984, although Consolidated would have been authorized to purchase from FGT, it "would have encountered a prohibitive transportation problem." 665 F.Supp. at 1534. That is, construction of "[a] lateral pipeline connecting Consolidated's facilities to the FGT main would have cost $250,000.00." *Id.* The district court concluded that "[t]here is grave doubt as to whether Consolidated could have effectively competed with City Gas based on these additional expenses." *Id.*

The test's first element requires "control of the essential facility by a monopolist." *MCI*, 708 F.2d at 1132–33. Based on its earlier holding that City Gas possessed monopoly power in the wholesale market, the district court assumed that City Gas was a monopolist with control over the "essential" facility—presumably, "a pipeline that transported wholesale gas." 665 F.Supp. at 1534. As I discuss above, *see supra* slip op. at 5152–5162, ____ - ____, City Gas did not possess monopoly power in the wholesale market; indeed, City Gas did not even operate in that market. The district court thus improperly concluded that City Gas was a monopolist for purposes of the first element of the essential facilities doctrine.

In addition, the district court improperly characterized the facility at issue here as "essential" under the first part of the test. The district court initially identified the "essential facility" as "a pipeline that transported wholesale gas." In so doing, the district court mischaracterized a very important feature of this facility: that is, City Gas' pipesystem transports only *retail*—and not *wholesale*—natural gas.[31] As

[31]As a more general problem, the district court improperly identified the facility at issue here. According to the district court's description, the facility appears to be a facility (the pipesystem) and the resource contained in that facility (the natural gas for resale). The district court, however, also referred to "City Gas' lateral pipe" as the essential facility. This lateral pipe connected City Gas' pipesystem to FGT's pipeline and

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such, this facility could not be essential to Consolidated's operation. Consolidated needed a facility that supplied wholesale gas. Because this facility supplied only retail gas, it did not do what Consolidated needed it to do. For this reason, the facility cannot properly be labeled "essential" under the doctrine's first element.

I also attack for one other reason the district court's conclusion that this facility is essential. As I note above, *see supra* slip op. at 5170, ____, the essential facilities doctrine is

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enabled City Gas to pump a supply of natural gas into its pipesystem. Which of these three elements—the gas, the lateral pipe, or the pipesystem itself—constituted the essential facility? Clearly, all three components, together, formed the essential facility here. Consolidated did not want access just to City Gas' lateral pipe. That pipe was located a long distance from Consolidated's pipesystem. Consolidated, however, needed more than just gas: it needed access to City Gas' entire pipesystem in order to obtain the gas. Of course, Consolidated wanted access to that pipe system only insofar as it contained gas, thus making the lateral pipe (through which City Gas acquired its gas) an indispensable component of the facility. In short, Consolidated wanted to hook into City Gas' pipesystem, at a point near Consolidated's own pipesystem, in order to take gas from City Gas' pipesystem (gas from FGT's pipeline that entered City Gas' pipesystem through City Gas' lateral pipe) in order to supply its own pipesystem. In effect, therefore, Consolidated wanted access to City Gas' entire distribution operation.

This case is not about a piece of City Gas' system, but rather about that system as a whole. Consolidated claimed that in order to compete with City Gas, it had to have access to City Gas' system. Consolidated needed gas from FGT, and, according to Consolidated, City Gas—with its lateral pipe and pipesystem—stood between Consolidated and FGT. Thus, Consolidated either had to go around City Gas' system or through it. Consolidated argued that going around that system would be too expensive to allow Consolidated to compete (in effect, what the second element of the essential facilities doctrine requires). It therefore claimed that access to the facility—i.e., City Gas' system as a whole—was "essential." Consolidated, therefore, wanted to be a customer of City Gas', but with an important difference from the rest of City Gas' customers: Consolidated wanted City Gas to sell this gas at a lower price than City Gas charged its other customers so that Consolidated itself could turn around and sell the gas.

designed to deal with the danger that a monopolist in control of a scarce resource will "extend[ ] its power vertically from one level of production to another." 665 F.Supp. at 1532–33. This concern, in my view, also defines the term "essential." That is, a facility becomes essential if, in restricting competitors' access to that facility, a monopolist gains a competitive advantage in another level of the market—that is, a market downstream or upstream from the market containing the facility itself. As courts have reiterated again and again, the antitrust laws do not protect competitors; rather, the laws protect competition. *See, e.g., Roland Machinery Co. v. Dresser Indus.*, 749 F.2d 380, 394 (7th Cir.1984), *United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir.1990). This principle, of course, applies to the essential facilities doctrine as well: the doctrine addresses the danger of monopoly leveraging and the anticompetitive effects that it has on *competition in general.* Applying this principle to the present case, City Gas' system is not essential in this sense. City Gas is not attempting to extend its power from one level of the market into another. City Gas, a monopolist at the retail distribution level, operates only at the retail level of the natural gas business. Its facility obviously relates to competition on that level, but the facility is not a mechanism for extending City Gas' power to another level of the market—or for that matter, from another level of the market onto the retail level. City Gas operates solely on a single level of the market. The facility here, therefore, cannot properly be labeled "essential."

Even assuming this facility could be labeled "essential," I question the district court's determination that Consolidated could not practically or reasonably have duplicated it for purposes of the second element of the test. Consider what Consolidated would have had to do in order to duplicate this facility. Consolidated already had a pipesystem in place from the days of its LP distribution. In order to change to natural gas distribution, therefore, Consolidated merely had to find a source of wholesale gas.

Buying gas from FGT, the regional wholesale supplier, required two things: (1) an allocation from FERC, and (2) a lateral pipe connecting Consolidated's pipesystem to FGT's pipeline. Consolidated applied to FERC for the allocation on May 21, 1982. FERC issued its final decision granting the allocation on September 19, 1984. The process thus took two years and four months. The lateral pipe would have cost Consolidated $250,000. These factors of time and expense are not sufficient to support the conclusion that Consolidated could not reasonably or practically have connected directly to FGT's pipeline.

As I discuss above, *see supra* slip op. at 5159–5160, ____, given Consolidated's projected future profits as a company with a natural gas supply, Consolidated could feasibly have obtained underwriting for a $250,000 bond to finance the lateral pipe. Based on the figures presented by Consolidated's expert witness, the company's annual profits, with a supply of gas, would have been approximately $267,000, and the company would have generated those profits for twenty years. The annual interest rate on a $250,000 bond, figured at a rate of fifteen percent, would be $37,500. Taking into account Consolidated's tax deduction for those interest payments, the real interest would be $24,750 annually—a figure representing 9.3% of Consolidated's annual profits. After paying that interest, Consolidated would be left with $242,250 in annual profits. Given those profits, Consolidated would have little trouble paying off the $250,000 principal on its bond offering at the end of twenty years. As these figures demonstrate, given the profits that Consolidated claims it could have generated for twenty years, it was clearly feasible for the company to undertake a $250,000 expenditure on a lateral pipe that would give it a supply of natural gas from FGT, an established wholesale supplier of natural gas.

This conclusion is also consistent with existing case law, which suggests that duplication of the facility must involve a

high degree of impracticality and infeasibility before it will satisfy the essential facility doctrine's second element. *MCI*, 708 F.2d at 1081, a case on which the district court itself relied, illustrates this limit. In that case, MCI brought suit against AT & T, claiming that AT & T's refusal to allow MCI to interconnect with various AT & T facilities constituted monopolization in violation of section 2 of the Sherman Act. A jury awarded MCI $1.8 billion; the Seventh Circuit affirmed in part, and reversed in part. I briefly state the facts.

Before 1969, the telecommunications industry existed as a lawful monopoly. The Bell System companies provided local exchange service, and AT & T provided long-distance service, which used the Bell System's exchange facilities to connect with customers on the local level. AT & T also used its long-distance lines to provide special services such as point-to-point lines (private lines connecting two locations) that do not require switching through the local exchange system and to provide other services such as foreign exchange (FX) lines and common control switching arrangements (CCSA) that do require switching through the local system.

In 1963, MCI began its attempt to enter the long-distance telephone market. It applied to the FCC for permission to construct and operate a long-distance system providing private-line service between Chicago and St. Louis. That service would require interconnections to ordinary local telephone lines in the two cities. Bell's local exchange system was all that was available. Six years later, in 1969, after a long administrative process, in which AT & T opposed MCI's application, the FCC finally approved MCI's request. As a result of that decision, applications similar to MCI's poured into the FCC. The FCC instituted a rulemaking procedure to deal with the applications. In June 1971, the FCC issued a decision, *see Establishment of Policies & Procedures for Consideration of Applications to*

Provide Specialized Common Carrier Servs. (Common Carrier decision), 24 F.C.C.2d 318 (1970), and as a result, AT & T agreed to enter into negotiations with MCI concerning the local interconnections. They reached an interim agreement in September 1971, but because AT & T disputed the reach of the *Common Carrier* decision, that agreement did not allow MCI interconnections for its FX or CCSA services. Finally, in April 1974, the FCC clarified the reach of its earlier decision and ordered AT & T to provide the disputed interconnections. Shortly before that decision, MCI filed its antitrust suit.

MCI's attempt to enter the telephone market thus involved substantial investments in time and capital. MCI spent *six* years engaged in administrative proceedings, with AT & T as an adversary, in order to gain initial FCC approval in 1969 for construction and operation of its St. Louis to Chicago line. *Two* more years passed before the FCC handed down its *Common Carrier* decision in 1971, and then another *three* years until the FCC finally clarified the effect of that decision in 1974 by issuing an order requiring AT & T to provide the disputed interconnections. From start to finish, the entire approval process took *eleven* years. In addition, MCI made a substantial expenditure in constructing its own long-distance lines. The original Chicago-to-St. Louis line required a terminal in each city and microwave relay towers along the whole length of the line to connect the terminals. MCI then extended the line from these original points as the company began to construct a nationwide long-distance system. This venture, moreover, to develop a nationwide long-distance system that would compete with AT & T, involved a tremendous capital investment, and even more initiative and risk. In order to finance its venture, MCI raised $110 million in loans and underwriting by leading lenders and equipment suppliers. As the *MCI* court stated, this made MCI "one of the largest start-up ventures in the history of Wall Street." 708 F.2d at 1095.

In contrast, Consolidated completed its allocation proceedings before FERC in twenty-eight months, but was then unwilling to spend $250,000 on a lateral pipe. Compare that process in terms of time and money to the eleven-year administrative proceeding that MCI went through and to the $110 million dollars that MCI raised and *actually invested*. Moreover, given Consolidated's net worth without a natural gas supply—approximately $775,000 according to its own experts—it could easily have financed the $250,000 required to construct the lateral pipe. *See supra* slip op. at 515–5160, 5173, ____ - ____, ____. If we take into account what Consolidated claims it would have been worth with a natural gas supply—*over $2.25 million* according to its expert witness—its claim that it could not feasibly spend $250,000 on a lateral pipe becomes truly preposterous. As the facts in *MCI* suggest, a high degree of impracticality and infeasibility must be demonstrated in order to satisfy the second element of the essential facilities doctrine.[32] Given the nature of MCI's investment in terms of time, money, and initiative, as compared to the significantly smaller investment that Consolidated was unwilling to make here, Consolidated has not satisfied the second element of the essential facilities doctrine. *MCI* surely does not stand for the proposition that a firm has a duty to provide a free ride to potential market entrants, and that is exactly what Consolidated is after by claiming that access to City Gas' pipesystem is essential to Consolidated's ability to enter the market.

In addition, I also question whether City Gas has actually refused to deal in this case. The district court found that City Gas made a series of offers to sell to Consolidated,

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[32]The nature of the facilities that courts have held are not practically or feasibly able to be duplicated in other essential facilities cases also supports my conclusion here. *See, e.g. Terminal R.R.*, 224 U.S. at 383, 32 S.Ct. at 507 (major railroad terminal); *Fishman*, 807 F.2d at 520 (Chicago stadium); *Aspen*, 738 F.2d at 1509 (ski mountain); *Hecht*, 580 F.2d at 982 (Robert F. Kennedy Stadium).

the lowest of which was at a price of cost (i.e., the cost of City Gas' wholesale gas from FGT) plus five cents per therm and held that those prices were so unreasonable that they constituted a refusal to deal under section 2. The district court, however, never determined what a reasonable price would have been. Indeed, the district court never set any price whatsoever: in granting Consolidated's request for an injunction ordering City Gas to supply wholesale gas, the district court never set a price for that mandated sale, but rather delegated the price-setting task to the FPSC. *See* 665 F.Supp. at 1512, 1534, 1545. If the district court never determined what a reasonable, or "fair"[33] price would have been, then I question on what basis it could legitimately have determined that City Gas' offered price was so unreasonable that it constituted a refusal to deal under section 2. As I discuss in more detail in part VI, the district court could have made that determination only in light of its determination of what the "fair" price would have been—that is, by comparing the offered price to the fair price and deciding that the offered price was so much higher than the fair price that it was unreasonable and constituted a refusal to deal. Without determining the fair price, therefore, the district court had no basis for concluding that City Gas' offered price constituted a refusal to deal. The third prong of the essential facilities doctrine is thus not satisfied here either.

For these reasons, the district court in my view improperly applied the essential facilities doctrine to the present case. As this discussion also suggests, this case is radically different from the typical essential facilities case. That the district court would nevertheless so readily apply the doctrine and also find it to be controlling—and that the court today would affirm that result—are therefore matters

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[33]As I explain in detail below, *see infra* slip op. at 5198–5205, ____ – ____, by "fair" price, I mean the price required by the just compensation clause of the fifth amendment.

of considerable concern to me. I think it is necessary to take this opportunity to analyze thoroughly the character and the limits of the essential facilities doctrine, and the implications of forcing its application to a case such as this one. I undertake to do so in the following subsection.

2. The Doctrine's Limits.

The essential facilities doctrine, as I explain above, *see supra* slip op. at 5163–5166, 5170–5171, ____ - ____, ____ - ____, is nothing more than a mechanism that aids courts in evaluating circumstantial evidence to determine whether the evidence supports an inference of anticompetitive intent. Given a certain type of fact pattern, the doctrine's four-part test will generally give rise to such an inference. Absent that type of fact pattern, however, even if the facts of the case could be found to satisfy the test, they would not support an inference of anticompetitive intent. Such an inference depends on more than the four elements of the test; it arises from the larger factual context—the circumstantial evidence—of the case as a whole. The four elements of the doctrine therefore may indicate, but by no means define, the kind of refusal-to-deal cases in which an inference of anticompetitive intent is justified. In this subsection, I undertake to describe more fully the factual features and the kinds of circumstantial evidence that are necessary to give rise to an inference of anticompetitive intent in addition to satisfying the essential facilities doctrine and its four-part test.

I begin with a discussion of the doctrine's origin and application in two Supreme Court cases—*United States v. Terminal R.R. Assoc.*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912), and *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945). Based on these cases, I describe the factual context necessary for a proper application of the essential facilities doctrine. I then consider the present case in light of that discussion in order

to demonstrate that this case lacks certain key features that must be present if the essential facilities doctrine is justifiably to give rise to an inference of anticompetitive intent and require the imposition of liability under section 2.

In *Terminal R.R.*, frequently cited as the original essential facilities case, a group of railroads that serviced St. Louis acquired ownership of a railroad terminal that provided the sole means of access to St. Louis. The terminal owners allowed competing railroads to use the terminal only on payment of an extremely high fee, an arrangement that secured a competitive advantage to the terminal owners' railroads. The terminal owners, however, allowed railroads from East St. Louis to use the terminal without payment, apparently because a toll bridge in Memphis, Tennessee provided the East St. Louis railroads an alternate means of access to the city. As a result of this situation, the federal government (and not a private plaintiff) brought an antitrust enforcement action against the terminal owners.[34]

The Supreme Court held in favor of the government and remanded the case to the district court with instructions to enter a decree requiring the terminal owners to provide all competing railroads with access to the facility "upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane . . . as that occupied by the proprietary companies." 224 U.S. at 411, 32 S.Ct. at 516. Two principal considerations supported the Court's decision. First, the Court noted that the terminal owners were not merely terminal owners. Their activities were not limited to operating the terminal, but also included the provision of railroad services in St. Louis. *See id.* at 406–07, 32 S.Ct. at 514. The terminal owners' railroads thus gained a competitive advantage in providing railroad service by virtue

[34]The government brought suit under section 4 of the Sherman Act, 15 U.S.C. § 4, contending that the arrangement was a combination in restraint of trade in violation of section 1 of the Sherman Act, *id.* § 1.

of their terminal ownership. The case thus involved a classic monopoly-leveraging situation: the terminal owners were using their monopoly power on one level of the market to gain a competitive advantage on another level of the market. Second, the terminal owners discriminated between other railroads in imposing the usage fee. The terminal owners did not, for example, assess a higher fee on railroads operating in East St. Louis. Based on these considerations, the Court issued its instructions concerning the decree.[35]

The next seminal Supreme Court case to which lower courts have pointed in discussing the essential facilities doctrine is *Associated Press*. In that case, the government brought an action seeking to enjoin enforcement of a newspaper association's bylaws. That association consisted of more than 1200 newspapers involved in the collection and distribution of news; the bylaws prohibited distribution or sale of news to nonmembers by any of the association's members. The government claimed that the arrangement constituted a conspiracy in restraint of trade—a violation, as in *Terminal R.R.*, of section 1 of the Sherman Act—as well as an attempt to monopolize in violation of section 2 of the Act.

The Court held that, in restraining the sale of news to nonmembers that competed with the association's members, the bylaws were designed to give members a competitive advantage over nonmembers and thus constituted a violation of the antitrust laws. The Court therefore approved an injunction ordering the association also to provide news

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[35]The Court rejected the government's request for a dissolution of the ownership group. Relying on a proposition that " 'injury to the public by the prevention of an undue restraint on or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest,' " *id.* at 409, 32 S.Ct. at 515 (quoting *Standard Oil*, 221 U.S. at 78, 31 S.Ct. at 523), the Court held that mandating equal access to the facility on the part of all railroads would accomplish the requirements of the antitrust laws most consistently with the public's interest in a well-operated railroad terminal.

to nonmembers on nondiscriminatory terms. 326 U.S. at 21, 65 S.Ct. at 1425. In *Associated Press*, as in *Terminal R.R.*, the Court emphasized that the defendant attempted to use its power as a newspaper association to gain a competitive advantage over nonmember newspapers—i.e., monopoly leveraging. In addition, as in *Terminal R.R.*, the association discriminated between newspapers in allowing access to its services: members, of course, enjoyed the benefits of the association's news, whereas nonmembers enjoyed no benefits, and the bylaws prevented certain newspapers from becoming members. Finally, as in *Terminal R.R.*, the element of conspiracy underlying formation of the association (or the group of railroads owning the terminal) influenced the Court's decision.

If we are to understand the essential facilities doctrine as an outgrowth of these cases, as the lower courts applying the doctrine suggest we should, then we must understand the limits of the doctrine as articulated in these cases. To that end, I offer some observations on the teachings of *Terminal R.R.* and *Associated Press*.

These cases demonstrate three distinct factual features. First, the defendants were already engaged in the business of providing access to the essential facility or resource at issue. The terminal owners in *Terminal R.R.* were in the business of providing terminal access to railroads. The newspaper association in *Associated Press* was in the business of gathering and distributing news to newspapers. In short, the defendants in both cases were already in the business of selling the essential resource, or service, to other entities. Second, the defendants were vertically integrated: they also operated on another level of the market, and the facility or resource at issue was essential to their operations on that level as well. The terminal owners in *Terminal R.R.* ran their own trains into St. Louis, and that operation required access to the terminal. The member newspapers in *Associated Press* ran their own newspapers and depended on the

association for their news. Third, the defendants in these cases, in control of essential facilities at one level of their operations, competed on the second level of operation with other entities that also required access to the essential facility in order to operate at this second level. The terminal owners in *Terminal R.R.* competed with other railroads servicing St. Louis, and those other railroads required access to the terminal in order to reach the city. Likewise, the member newspapers in *Associated Press* competed with nonmember newspapers that needed the association's news. Given these three factors, the defendants' attempts to restrain their competitors' access to the essential facilities at issue became significant for antitrust purposes: under the circumstances, that conduct gave rise to an inference of anticompetitive intent.

The essential facilities doctrine merely provides a means to evaluate this type of fact pattern in order to determine whether the facts give rise to such an inference of intent. I question how far courts can legitimately extend the doctrine when the circumstances of a case fail to approximate the fact pattern of these two cases. The cases themselves provide some guidance on this point. As the Supreme Court indicated in *Terminal R.R.*, it would have been a different case if the terminal owners had been solely in the terminal business and not in the railroad business as well. *See* 224 U.S. at 406–07, 32 S.Ct. at 514. If that were the case, the terminal owners' conduct in charging high prices would not have had the anticompetitive overtones that the conduct had in the actual case. The case would not have been a monopoly-leveraging case: the terminal owners would not have been using their monopoly power over the terminal to gain a competitive advantage in supplying railroad services; they would simply have been charging some railroads a higher fee for use of the terminal. The inference of anticompetitive intent in the case did not arise from the conduct—the high fee charged for access to the terminal—in and of itself; rather, the inference arose from the *effect* of

the high fee on the terminal owners' competitive position in the downstream railroad market. By charging downstream competitors a higher fee, the terminal owners obtained a competitive advantage in providing railroad service to St. Louis. *See id.* at 408, 32 S.Ct. at 515. If the terminal owners had not also been in the business of providing railroad services, then their high fee charges would have produced no such competitive advantage and would not, therefore, have given rise to an inference of anticompetitive intent.

The circumstances of the *Associated Press* case also support this analysis. The association's refusal to supply news to nonmember newspapers gave the member newspapers a competitive advantage in the newspaper market. The refusal to deal thus gave rise to an inference of anticompetitive intent. If the association were differently constituted—for example, as an independent news-reporting service, not composed of newspapers, and not engaged in the newspaper business—its refusal to deal with nonmember newspapers would not have given the association a competitive advantage on another level of operation. The association, in that case, would not have engaged in monopoly leveraging, and its refusal to deal would not have signaled an anticompetitive intent.

These two cases would also have been different if the defendants had not already been in the business of providing access to the essential facility at issue, which is exactly the situation in the present case. This type of situation, however, is so fundamentally different from the fact pattern of *Terminal R.R.* and *Associated Press* that the Court in those cases did not touch on how to approach it. I therefore discuss a hypothetical case in order to demonstrate that the essential facilities doctrine does not properly extend to this type of situation: that is, absent the first factual feature of these two cases, satisfying the four elements of the essential facilities doctrine will not give rise to an inference of anticompetitive intent. As I also demonstrate, the

imposition of liability under section 2 in this hypothetical case would have practical implications that do not arise in the typical essential facilities case. The typical cases, moreover, fail to foresee these practical implications, let alone to address them. For this reason as well, the essential facilities cases do not control the result in this hypothetical case.

Assume that a newspaper called the *Times* possesses a one hundred percent share of the daily newspaper market in a given city. The *Times* has achieved this position by providing first-rate news and reporting services for years. The *Times* has a large reporting staff and, because it has been in business for a long time, its reporters have a vast web of information sources throughout the city. Assume, further, that the *Post* undertakes to publish a daily newspaper in the same city, thus entering into competition with the *Times*. The *Post*, however, has only enough resources for a small reporting staff, and even if it could afford a larger staff, it would take several years to build up the information network that the *Times*' reporters have developed. The *Post*, therefore, wants to buy news from the *Times*. The *Times*, however, refuses to sell to the *Post*. The *Times* has never sold its news to anyone (newspapers or otherwise) and has no intention of starting to do so now. As the *Times* also admits, it has no interest in supplying news to a rival newspaper so that the rival can compete. Indeed, in the *Times*' view, if the *Post* cannot survive in the daily newspaper market unless it can obtain news from the *Times*, that is all for the better. As would be expected, the *Post* has a difficult time making ends meet. The *Post*, therefore, hires some lawyers of its own and brings an antitrust suit against the *Times*, seeking an injunction ordering the *Times* to sell news to the *Post*.

I suggest that the court must deny this request for an injunction: the essential facilities doctrine provides no basis for imposing a duty to deal on the *Times* under these circumstances. As a preliminary point, this is not a

monopoly-leveraging case such as *Terminal R.R.* or *Associated Press*. The *Times* is not a vertically integrated entity: the paper assembled its large reporting staff and developed its information networks entirely for purposes of, indeed as an integral part of, its own newspaper operation and not, as in *Associated Press*, to produce news for resale. The *Times* has never sold news to any other entity whatsoever. Its refusal to sell news to the *Post*, therefore, could not be classified as an attempt to use its "monopoly" power as a newsgatherer to maintain its distribution monopoly: its newsgathering operation is an integral part of its newspaper operation as a whole.[36] Given the constantly reiterated rationale of the essential facilities doctrine—to prevent against the evils of monopoly-leveraging—this hypothetical case would thus appear to fall beyond the doctrine's scope. For the sake of discussion, I assume that the essential facilities doctrine could theoretically apply to this non-monopoly-leveraging case. In practice, however, it could not.

Even assuming the elements of the essential facilities doctrine were satisfied here—i.e., the court finds that the *Times* is a monopolist in control of an essential resource that the *Post* cannot reasonably or practicably duplicate, and the *Times* has refused to supply that resource to the *Post* although it could feasibly do so—under the circumstances of this case, the *Times*' conduct in refusing to deal with the *Post* does not give rise to an inference of anticompetitive intent. Because the *Times* has never sold news, it has not acted inconsistently in refusing to deal with the *Post*. In the typical essential facilities case, in contrast, the defendant does act inconsistently, refusing to deal with some entities but not with others. In *Terminal R.R.*, for example, the terminal owners charged some railroads an exorbitant fee for access to the terminal and charged others a reasonable fee

[36]The monopoly-leveraging cases that I discuss above, *see supra* slip op. at 5169–5170, ____ – ____, would therefore not control here either.

for the same access. In these typical cases, moreover, the inconsistent treatment relates to potential customers' status as competitors: the terminal owners in *Terminal R.R.*, for example, refused to deal only with railroads that also competed with the terminal owners' railroads. The inconsistent treatment there, coupled with the refused railroads' status as competitors, signaled the defendant's anticompetitive intent.

If the defendant treats all potential customers the same, however, even if it uniformly refuses to deal with any at all, that conduct would not give rise to an inference of anticompetitive intent. Thus, the *Times*, unlike the terminal owners, has not acted inconsistently in refusing to deal with the *Post*. For whatever reasons, the *Times* has chosen not to sell its news at all, and its decision not to deal with the *Post* merely follows from that blanket policy. Its decision is not inconsistent. Nor does the decision relate to the *Post's* specific status as competitor. Unlike the fact pattern in the *Terminal R.R.* and other typical essential facilities cases, therefore, the circumstances of this hypothetical case give rise to no inference of anticompetitive intent.

The practical implications of imposing a duty to deal on the *Times* also suggest the inapplicability of section 2 under these hypothetical circumstances. In *Terminal R.R.*, *Associated Press*, and other typical essential facilities cases, the defendants, when ordered to deal with the excluded entities, did not have to undertake a new business or provide a new service. They merely had to give the excluded entities the *same service that was already being provided* to other entities. Thus, in response to the Court's decision, the defendants in both cases had to stop *not doing what they usually did*. The Court's decision enjoined them to operate normally with respect to all customers. In this hypothetical case, however, if the *Times* were ordered to deal with the *Post*, the court's decree would be fundamentally different from the decrees in typical essential facilities cases. This

decree would not order the *Times* to resume its ordinary course of operation; rather, it would order the *Times* to undertake a *new* course of operation, to *begin providing a service that it had never before provided.* In my view, this kind of a case is fundamentally different from the typical essential facilities case.[37] Not only is this kind of case factually and legally inconsistent with typical essential facilities cases, but the practical implications of imposing a duty to deal under these circumstances are radically different than such implications in the typical essential facilities cases. Consequently, those cases simply do not control here.

As a general matter, the antitrust laws do not impose a positive duty on companies to help competitors. The antitrust laws focus on various types of conduct that inhibit competition. The laws, however, do not purport to facilitate competition by imposing a duty on a company to help another company into competition. As the Seventh Circuit stated in *Olympia Equip. Leasing Co. v. Western Union Tele. Co.*, 797 F.2d 370, 375–76 (7th Cir.1986), *cert. denied*, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1987), a firm

> has no general duty to help its competitors. . . . "There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter." . . . A monopolist has no duty to reduce its prices in order to help consumers, . . . and no duty to extend a helping hand to new entrants. . . .

Id. (quoting *USM Corp. v. SPS Technologies, Inc.*, 694 F.2d 505, 512–13 (7th Cir. 1982), *cert. denied*, 462 U.S. 1107, 103 S.Ct. 2455, 77 L.Ed.2d 1334 (1983)) (citations omitted). It is not surprising, therefore, that in every essential facilities case disclosed by my research in which a court imposed a

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[37]Indeed, it differs from refusal-to-deal cases in general, under any formula of analysis. *See supra* slip op. at 5162–5167, ____ – ____.

duty to deal, the defendant was already engaged in the course of dealing at issue. *E.g., Otter Tail*, 410 U.S. at 428, 93 S.Ct. at 1022 (defendant already in business of wheeling power); *Associated Press*, 326 U.S. at 1, 65 S.Ct. at 1416 (defendant already in business of selling news); *Terminal R.R.*, 224 U.S. at 383, 32 S.Ct. at 507 (defendant already in business of operating railroad terminal); *Fishman*, 807 F.2d at 520 (defendant already in business of leasing Chicago stadium); *Aspen*, 738 F.2d at 1509 (defendant already engaged in practice of providing all-Aspen ski ticket), *aff'd*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985); *MCI*, 708 F.2d at 1081 (defendant already in business of providing interconnections to local telephone exchange networks); *Hecht*, 570 F.2d at 982 (defendant already in business of leasing Robert F. Kennedy Stadium). In these cases, moreover, the defendant had *in fact* been engaged in the course of dealing at issue: a duty to deal has never been imposed on a company under the rationale that the company could, in the court's view, feasibly engage in that course of conduct. Under this established law, therefore, the *Times* has no "positive duty" to sell news to the *Post*. But that is exactly the kind of duty that an injunction ordering it to deal with the *Post* would impose on the *Times*.

This legal principle—that the antitrust laws impose no positive duty on a company to help its competitors—is also supported by strong policy considerations. The imposition of a duty to deal in such circumstances would encourage economic inefficiencies and promote inequity. In order to achieve its level of success in the newspaper business, the *Times* invested significant amounts of capital over a period of time. That investment required initiative and involved significant risks. An attempt by any company to develop a product or service—i.e., to compete in a market—requires initiative, innovation, and risk-taking. Our antitrust laws are designed to ensure that every company has the opportunity to compete under these terms. Our antitrust laws, however, do not mandate that a company, having made this

investment in capital and taken this initiative and risk, must then provide a free ride into the market for every potential new competitor that comes along. Such a policy would be unfair to those companies that have made investments and taken risks; moreover, it would discourage businesses from taking initiative, assuming risk, and making investments of capital in the first place. A policy that would lead to these results is not, in my view, a good one; nor is it the policy behind our antitrust laws.

In addition, courts must respect rational decisions of economic actors. If the *Times* has opted not to undertake a course of operation—not to sell to others material that it develops for its own operation—the court has no business second-guessing that decision. The *Times* itself is in the best position to evaluate whether to enter into the course of dealing at issue, and it has decided not to do so. For the court to evaluate such a decision—in effect upholding or overturning it by deciding whether or not to impose a duty to deal—would push the court beyond the limits of its administrative capabilities. If courts were to review such decisions, then the question whether an entity should have undertaken a course of dealing would become an element of every refusal-to-deal case.[38] The plaintiff would bear the burden of proving this element of the case, and the courts would have to develop a legal standard for judging the evidence. I suggest that this "element" of a refusal-to-deal case would be an impossible one to prove. What kind of a showing would the courts require a plaintiff to make? Assume a plaintiff has access to a defendant's books, to the defendant's research and development, and to the defendant's plans for expansion and growth—or that the plaintiff could devise a reasonable approximation of this

[38]As such, this element would be very different from a legitimate business reason asserted by a company in its defense after a plaintiff has already submitted sufficient evidence to raise an inference of anticompetitive intent.

information. What if, based on this evidence, the plaintiff could show that the defendant could feasibly undertake the activity at issue, indeed would profit from that activity: would that provide a sufficient basis for a court to hold, as a matter of law, that the defendant *must* undertake that course of conduct? Would it be sufficient if the plaintiff could make an even stronger showing—a showing that the defendant could not stay in business without undertaking that course of dealing, but that if the defendant did undertake it, he would become a millionaire, indeed a billionaire? What if the defendant argues in defense of its decision not to undertake the course of dealing that its board of directors and shareholders had a moral objection to doing so? Or that such an undertaking would place additional demands on the staff's time, which would conflict with the company's policy emphasizing the importance of spending quality time outside of the office? Or, that the undertaking would simply be inconsistent with the company's own plans for expansion? I suggest that the court has no legal basis for forcing a party to undertake an operation that the party has chosen not to undertake.

The courts would also face extreme administrative problems in imposing effective remedies in cases like this hypothetical one. If the court issued an injunction ordering the *Times* to sell news to the *Post*, the court would obviously have to set a transaction price in its injunction. In the typical essential facilities case, the court can simply look to the terms set by the defendant in its normal dealings with other customers. Unlike the association in *Associated Press* or the terminal owners in *Terminal R.R.*, however, the *Times* has no established terms for the sale of news to which the court could look in fixing a transaction price. Thus, the court must come up with a price on its own. As I discuss in detail in part VI, courts would confront severe difficulties in undertaking this price-setting task. The price must be fair to

the *Times*;[39] the court cannot require it to sell news at a loss, or at the cost of its ability to compete. On the other hand, the price must also enable the *Post* to compete; if the *Post* cannot compete after purchasing news at that price, then the court will be unable to fashion a remedy that will provide relief to the Post. In that event, under established principles of equity, the case must be dismissed: courts cannot entertain claims that cannot be remedied. I discuss these issues in more detail below, *see infra* slip op. at 5196–5215, ____ - ____.

Because the essential facilities cases all involve defendants that are already engaged in providing the service at issue, those cases do not foresee, let alone address, any of the practical problems that would arise if the court were to impose a duty to deal in cases like this hypothetical case. Given these problems, and the failure of the essential facilities cases to provide any guidance, that doctrine provides no basis for liability under section 2 in this hypothetical case.

This hypothetical case, moreover, closely resembles the present case. For the same reasons that the hypothetical case is not properly an essential facilities case, neither is the present case. City Gas has decided not to enter the business of supplying natural gas at wholesale. In so deciding, it has done nothing wrong, and its conduct in refusing to sell wholesale gas to Consolidated is not anticompetitive conduct under these essential facilities cases. Nor do the antitrust laws impose a duty on City Gas to enter the wholesale supply business and sell gas to Consolidated. The antitrust laws impose no positive duty on a company to help its competitors. Imposing such a duty in this case, as in the hypothetical case discussed above, would create serious problems of policy and of judicial administration. For these reasons, under the teachings of *Terminal R.R., Associated*

[39]That is, it must satisfy the fifth amendment's just compensation requirement. *See infra* slip op. at 5198–5205, ____ - ____

Press, and their progeny, the essential facilities doctrine does not justify the imposition of liability under section 2 in the present case.

E. *The "Intent Test."*

The district court also analyzed the case under the so-called "intent test," which considers whether, under the circumstances of a case, a monopolist's conduct demonstrates an illegal intent to destroy competition. If the conduct gives rise to an inference of anticompetitive intent, then the monopolist is subject to liability under section 2. *See Lorain Journal*, 342 U.S. at 153, 72 S.Ct. at 186; *Eastman Kodak*, 273 U.S. at 375, 47 S.Ct. at 404; *MCI*, 708 F.2d at 1148; *Poster Exchange*, 431 F.2d at 338. Applying these cases generally, the district court found, "based on a review of the record evidence, that [City Gas'] real purpose here was to maintain its monopoly unlawfully." 665 F.Supp. at 1540. It held, therefore, that City Gas' conduct constituted a violation of section 2.

Courts have used this approach in both monopoly-leveraging and non-monopoly-leveraging cases. In the former, which I discuss above, *see supra* slip op. at 5169–5170, ____ - ____, the courts have held that the conduct of monopoly leveraging is sufficient evidence of illegal intent to justify the imposition of liability under section 2. *See, e.g., Eastman Kodak*, 273 U.S. at 375, 47 S.Ct. at 404; *Poster Exchange*, 431 F.2d at 339. Courts have also inferred intent in non-monopoly-leveraging cases, where a company with monopoly power on one level of the market refuses to deal in order to maintain its monopoly on that same level of the market. *See, e.g., Lorain Journal*, 342 U.S. at 153–54, 72 S.Ct. at 186–87. This so-called "intent test" is of course nothing more than a fancy label for what courts do in virtually every refusal-to-deal case under section 2: because direct evidence of anticompetitive intent rarely exists, courts evaluate the circumstantial evidence in a given case to determine whether it gives rise to an inference of

anticompetitive intent. The intent-test cases, therefore, demonstrate factual contexts from which such an inference can arise.

As the preceding sections make clear, the present case does not involve monopoly leveraging. The district court, therefore, could not have inferred an illegal intent from an attempt by City Gas' to extend its monopoly power from one level of the market to another. As I discuss above, the *Eastman Kodak-Poster Exchange* cases, which involve monopoly leveraging, do not control the present case. If the evidence in this case is to give rise to an inference of anticompetitive intent, therefore, it must do so on the basis of City Gas' conduct in using its power on the retail level in order to maintain its monopoly on that same level. Given this situation, *Lorain Journal* becomes the relevant case.

In that case, the only newspaper in Lorain, Ohio refused to accept paid advertisements from parties also advertising on a radio station that had begun to compete with the newspaper in the advertising market. The government brought an enforcement action under section 4 of the Sherman act, claiming that the newspaper had acted in violation of section 2. The Supreme Court agreed and approved an injunction requiring the newspaper to accept advertisements on its already established terms even if the parties also advertised on the competing radio station. The newspaper was not itself involved in the radio business, nor did it have any desire to become involved in that business. It was not, therefore, attempting to use its monopoly power in the newspaper advertising business to gain a share of the radio broadcasting market. Rather, the newspaper's conduct was designed to protect its own monopoly in the newspaper advertising business. That conduct, though, demonstrated the newspaper's anticompetitive intent to foreclose competition in the relevant advertising market.

Lorain Journal, like other refusal-to-deal cases, has a crucial factual feature: the newspaper refused to provide a

service that it was already in the business of providing. The newspaper sold advertising space on established terms (presumably a given dollar amount per column inch) to parties that wanted to advertise. The case arose when the newspaper refused to sell such space on the same terms to certain parties that also wanted to advertise.[10] The present case, of course, lacks this feature: City Gas has not refused to sell what it was already in the business of selling. Consolidated wanted to buy gas at wholesale. City Gas, however, sold only retail gas, which is an entirely different product. Because of this factual distinction, *Lorain Journal* does not control here for two reasons.

First, what gave rise to an inference of anticompetitive intent in *Lorain Journal* was the newspaper's diversion from its established course of conduct. The newspaper suddenly refused to sell advertising. Of course, it also refused only with respect to a specific class of advertisers—those also advertising on the competing radio station. The sudden refusal, coupled with the identity of the refused customers, clearly signaled an anticompetitive intent. In the present case, City Gas did not change its established course of conduct. Rather, it did exactly the opposite: it refused to divert from its established course of conduct. City Gas has never sold gas at wholesale, and it continued not to do so in the present case. The fact that Consolidated, the would-be purchaser here, was a competitor of City Gas means nothing because City Gas never sold to any firm at all, regardless of the firm's competitive status. *Lorain Journal* is therefore distinguishable on the facts.

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[10]These advertisers, moreover, did not request advertising space on special terms, monetary or otherwise; the subject of their advertisements was unobjectionable; and the advertisements would not have had an adverse impact on the newspaper's ability to attract other clients. Thus, the newspaper presumably had no legitimate business reason for its refusal.

In addition, because this case does not involve a business in which City Gas was already engaged, it poses remedial problems not present in *Lorain Journal*. There, the trial court could simply mandate that the newspaper sell advertising space to the excluded parties on the same terms that the newspaper sold space to all other advertisers. Such a remedy would provide the excluded parties with relief—advertising space in the newspaper—and the court could easily impose that remedy within the limits of its administrative capabilities. That, however, is not the case here. Because City Gas does not, and has never, sold natural gas at wholesale, it obviously has established no terms for such a transaction. The district court, therefore, could not simply mandate that City Gas sell Consolidated wholesale gas on its already-established terms. Instead, the district court itself had to set a price for the forced sale. The district court did not do so, however; rather, it delegated the task to the FPSC. Had the district court undertook to set the price, it would have found that task to be impossible, as I discuss in detail in part VI below. For this reason as well, *Lorain Journal* does not control the present case.

As this discussion demonstrates, therefore, the so-called "intent test" provided no basis for imposing liability here. Unlike the typical refusal-to-deal cases analyzed under this test, the circumstances in this case simply did not give rise to an inference of anticompetitive intent. I turn now to a discussion of two additional Supreme Court cases.

F. Aspen *and* Otter Tail.

The district court also relied heavily on two more recent Supreme Court cases—*Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985), and *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973)—which also involve refusals to deal under section 2. Although lower courts frequently cite both cases as support for the essential-facilities doctrine and the intent test, as well as the

monopoly-leveraging theory, neither case explicitly applies any of these formulas for determining liability in section 2 cases. Both cases, nevertheless, follow from the general principles established in the early Supreme Court cases that I discuss in the preceding section. I consider *Aspen* and *Otter Tail* in turn, analyzing the theories of liability applied in the cases and demonstrating that neither case supports the imposition of a duty to deal on City Gas.

1. *Aspen.*

In *Aspen,* Aspen Highlands Skiing Corp. (Highlands), which owned one of four skiing areas in Aspen, brought a private antitrust suit against Aspen Skiing Company (Ski Co.), which owned the other three areas. From 1962 to 1977, Ski Co. and Highlands had offered an all-Aspen ticket that skiers could use interchangeably at all four skiing areas. In the 1977-78 season, however, Ski Co. offered to participate in the all-Aspen ticket only on terms that were unacceptable to Highlands; Ski Co. would consider no counterproposal and, as the district court held, in effect refused to deal with Highlands. Highlands brought a treble damages action against Ski Co. under section 4 of the Clayton Act, claiming that Ski Co. had monopolized the downhill skiing market in violation of section 2 of the Sherman Act. As the Supreme Court described, the case raised the question whether "a firm with monopoly power has a duty to cooperate with its smaller rivals in a marketing arrangement in order to avoid violating § 2 of the Sherman Act." 472 U.S. at 587, 105 S.Ct. at 2849.

In the district court, a jury found in favor of Highlands, and the Tenth Circuit affirmed, relying on the essential facilities doctrine as a basis for holding that Ski Co. had a duty to deal with Highlands. The Tenth Circuit also held that sufficient evidence existed to support the jury's finding that Ski Co. had an intent to create or maintain a monopoly. The Supreme Court approached the case in broader terms, analyzing whether Ski Co. had a duty to deal with Highlands

under the circumstances. The Court first stated that "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor." *Id.* at 600, 105 S.Ct. at 2856. The Court elaborated that this proposition is a counterpart to the "independent businessman's cherished right to select his customers and his associates." *Id.* at 601, 105 S.Ct. at 2856. Of course, as the Court quickly qualified, these rights—both to select customers and not to deal with competitors—are not absolute. The Court articulated the key to determining when such a decision constitutes an antitrust violation: when "the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'" *Id.* at 602, 105 S.Ct. 2857. The Court then examined Ski Co.'s conduct.

The Court identified a crucial feature of Ski Co.'s refusal to deal:

> In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.

Id. at 603, 105 S.Ct. at 2858. Ski Co.'s refusal to deal thus demonstrated one of the key features of the *Terminal R.R.* and *Associated Press* cases: its refusal to deal was not a refusal to undertake a new course of dealing; rather, it was a refusal to continue a course of dealing in which it was already engaged.

After identifying this feature, the Court suggested that even such a decision "to make an important change in the character of a market . . . is not necessarily anticompetitive." *Id.*, 105 S.Ct. at 2858. As the Court explained, the question "cannot be answered by simply considering [the] effect of [Ski Co.'s conduct] on Highlands.

In addition, it is relevant to consider its impact on consumers and whether it had impaired competition in an unnecessarily restrictive way." *Id.* 472 U.S. at 605, 105 S.Ct. at 2859. Based on its consideration of these additional factors, the Court agreed that the evidence was sufficient to support a finding that "consumers were adversely affected by the elimination of the 4-area ticket." *Id.* at 606, 105 S.Ct. at 2859. The Court also noted that Ski Co.'s conduct was not "justified by any normal business purpose." *Id.* at 608, 105 S.Ct. 2860. Because the evidence was sufficient to support the jury's verdict in favor of Highlands, the Court affirmed.

This case does not support the imposition of a duty to deal on City Gas. The decisive feature in *Aspen*—Ski Co.'s decision "to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years," *id.* at 603, 105 S.Ct. at 2858—is not present in this case. On the contrary, City Gas made no "important change in a pattern of distribution;" indeed, City Gas *refused* to make such a change, and that refusal is what Consolidated challenges in the present case. Given this crucial distinction between *Aspen* and the present case, *Aspen* does not control.

The remedy problem in the present case also did not arise in *Aspen*. Although the Supreme Court made no mention of the damages amount awarded in *Aspen*, the long history of the all-Aspen ticket produced an extensive body of evidence on the division of profits from the all-Aspen ticket between Ski Co. and Highlands. The trial court (or jury) in that case could easily have arrived at a damages figure that would accurately have reflected Ski Co.'s economic position while providing relief to Highlands. That is not true in the present case. Because City Gas has never sold gas for resale, either to Consolidated or anyone else, the district court had no point of reference for calculating a hypothetical transaction price. See *infra* slip op. at 5201–5205, ____ – ____, for a detailed elaboration of this point.

Aside from the problem of imposing a remedy in the present case, the district court below also failed to focus on any of the factors articulated by the Supreme Court in *Aspen* as support for the Court's determination that Ski Co.'s conduct was exclusionary: whether the conduct had an "impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Id.* at 605, 105 S.Ct. at 2859. A consideration of these factors in the present case also suggests that City Gas' refusal to deal is not classifiable as exclusionary.

With respect to the conduct's impact on consumers, the record contains no evidence of a negative impact. In fact, the district court indicated that City Gas' service was more economical than the service that Consolidated could provide. *See* 665 F.Supp. at 1505. The district court did note that City Gas would have to pass on to its customers the costs of extending its pipesystem into Consolidated's service area. *Id.* at 1513. The district court, however, failed to account for the increased price that Consolidated would have to pay for wholesale gas compared to the price City Gas paid FGT: even if City Gas were forced to sell to Consolidated, it would be entitled to sell at a rate providing a reasonable rate of return on its investment, *see supra* part VI. Assuming that City Gas' distribution and hook-up operation was efficient, and no evidence to the contrary appears, Consolidated would have to make up for the difference in its wholesale price either by charging its retail customers more than City Gas would charge or by streamlining even further its distribution operation. Even assuming that Consolidated could streamline its operation, the record contains no evidence that this would actually benefit consumers. Unlike the negative impact on consumers from the abolition of the all-Aspen ticket in *Aspen*, the benefits to consumers from Consolidated's entry into the market would be minimal—at best, slightly reduced natural gas rates for some consumers. Even that benefit would come only at the expense of higher natural gas rates for other

consumers. I question, moreover, whether this type of competition really would benefit the consumer. Competition that forces a natural gas utility to streamline its operation might, in fact, harm the consumer. Although such competition could conceivably result in slightly decreased gas rates for some customers, it might increase safety risks for all customers by pressuring gas suppliers to cut corners in order to lower their prices. That sort of pressure would not benefit consumers.

Moreover, the district court failed to consider that given the nature of the natural gas business, competition in that business is likely to benefit consumers only in the short term, if at all. As the district court stated, City Gas possessed a natural monopoly in its service area. That is not strange: because entering the natural gas supply business involves the expenses of building a pipesystem and arranging hook-ups to customers, virtually every supplier has a natural monopoly in its supply area. Two supply companies cannot continue to operate in the same service area. Companies compete only at the outset to gain control of a service area and to expand into new areas as they develop. Given the naturally monopolistic state of the natural gas supply business, the benefits of competition to the consumer are limited. Competition between companies for initial control of a service area may lower retail prices, but only in the short term. Once one supplier gains control of the service area (and thus develops a natural monopoly), the incentive for lower retail pricing also ends. (Of course, the FPSC monitors the rates set by all natural gas companies. *See infra* slip op. at 5220, ____ .) Moreover, consumers would not benefit from continuing competition between gas companies within a single service area. Constant switching by customers between companies would generate transaction costs and force an increase in retail prices to all customers. In addition, constant competition between companies is likely to undermine safety concerns as the companies try to shave costs in order to increase their competitiveness.

Competition in the natural gas supply market is, therefore, by no means the best state of affairs from the consumers' perspective.

As this discussion indicates, *Aspen* does not support the imposition of a duty to deal in the present case. The *Aspen* case is immediately distinguishable from the present case in that Ski Co.'s refusal to deal involved a significant alteration in its previous course of dealings with Highlands. That course of dealing provided a reference point for a meaningful damages award. No such course of dealing exists in the present case. Also, whereas the refusal to deal in *Aspen* adversely affected skiers, the refusal in this case had no such effect on gas consumers. In fact, the evidence suggests that the continued existence and expansion of City Gas' natural gas monopoly might actually benefit consumers, especially with respect to long-term safety concerns.

2. *Otter Tail.*

Nor does the Supreme Court's holding in *Otter Tail,* 410 U.S. at 366, 93 S.Ct. at 1022, support the imposition of a duty to deal in the present case. In *Otter Tail,* an electric power company produced electricity on the wholesale level and distributed its electricity as a retail franchisor in various municipalities. The company also engaged in "wheeling," or transmitting power generated by other companies over its transmission system. On the retail distribution level, municipalities granted Otter Tail ten- or twenty-year franchises, and during that time Otter Tail served as the sole distributer—a natural monopolist—in the given municipality. The case arose when certain municipalities attempted to establish municipal distribution systems on their own. Having built their own local distribution systems, the municipalities hoped that Otter Tail would sell or wheel them wholesale power. Otter Tail, however, refused to provide either service. Consequently, the government brought an antitrust enforcement action against Otter Tail, attempting to enjoin it from refusing to deal with the

municipalities under the circumstances. The district court granted the government an injunction, and the Supreme Court upheld the decree.

Unfortunately, the *Otter Tail* opinion reveals no immediate rationale in support of the district court's action. As Judge Easterbrook observed in his dissent in *Fishman v. Estate of Wirtz*, 807 F.2d 520, 573–74 (7th Cir.1986):

> A study of the majority opinion for four Justices in *Otter Tail* will not reveal the Court's reason; it gave only a result. . . . It did not offer any reason other than to say that Otter Tail had reduced competition. . . . To rely on *Otter Tail* my colleagues must be able to tease a reason out of a silent opinion.

In Judge Easterbrook's view, the key to the *Otter Tail* decision is the effect that Otter Tail's refusal to deal had on the electricity-generating level of the market. As Judge Easterbrook described, three markets existed in the electric power industry: the power generation market, the transmission market, and the retail distribution market. Otter Tail controlled the transmission market, and its refusal to deal occurred on that level. What made that refusal to deal an antitrust violation, in Judge Easterbrook's view, was that competition existed on the generating level. That is, the municipalities that wanted to enter into retail distribution of electricity could have taken advantage of the competition on the generating level, which would have resulted in lower prices for consumers at the retail level, if Otter Tail would have agreed to wheel. And according to Judge Easterbrook, consumer benefit is the primary consideration in determining antitrust liability. *See also Aspen*, 472 U.S. at 605, 105 S.Ct. at 2859; *supra* slip op. at 5187–5188, ____ - ____. Thus, Otter Tail's conduct was clearly anticompetitive.

Given this interpretation, *Otter Tail* does not control the present case. Judge Easterbrook's description of the

three levels of the electric power industry applies also to the natural gas industry. As I describe above, *see supra* slip op. at 5167–5169, ____ - ____, the natural gas industry consists of three stages: (1) production; (2) interstate transportation and wholesale supply; and (3) intrastate distribution at retail. The present case, however, is factually distinguishable from *Otter Tail* in two respects: first, whereas Otter Tail participated on the transmission level as well as on the distribution level, City Gas participated only on the retail distribution level; second, whereas competition existed on the generating level in *Otter Tail,* no such competition existed in the present case—FGT was the only source of wholesale gas in the region. Thus, the absence of competition on the generating (or wholesale) level in the present case means that consumers would not have benefitted had City Gas not refused to deal, in contrast to *Otter Tail* where consumers would have benefitted had Otter Tail not refused to deal. In addition, because City Gas never participated in the second level of the market, its conduct had no causal connection to any benefit consumers might have derived even if competition had existed on the production or wholesale levels. Applying Judge Easterbrook's interpretation of *Otter Tail,* then, that case does not control here.

Another possible rationale for the *Otter Tail* holding is that Otter Tail engaged in classic monopoly leveraging—using its power on the transmission level to increase its business on the retail distribution level. Throughout the *Otter Tail* opinion, the Court indicated that Otter Tail had "'a strategic dominance in the transmission of power in most of its service areas'" and that Otter Tail used that dominance "to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply." *Id.* at 377, 93 S.Ct. at 1029. This rationale, of course, does not apply in the present case: City Gas has not engaged in monopoly leveraging. Otter Tail was clearly a

vertically integrated company; City Gas, as I discuss above, was just as clearly not vertically integrated.

As the district court in *Otter Tail* stated, Otter Tail's "operation consists of an integrated power system running the full gamut from initial production to final sale of electrical power combined with pool arrangements which supply emergency power reserves." *United States v. Otter Tail Power Co.*, 331 F.Supp. 54, 56 (D.Minn. 1971). Although Otter Tail did the majority of its business on the retail level, it also contracted with a number of other electric systems to obtain supplementary power, which it both used itself and "regularly" wheeled to other companies. *Id.* at 56–57. For example, it wheeled power to approximately eighteen municipalities pursuant to an interconnection contract with the Bureau of Reclamation, the entity that had agreed to supply wholesale power to one of the municipalities with which Otter Tail refused to deal. *Id.* at 57–58. City Gas, on the other hand, was not involved in the initial production of gas; it was not a natural gas wholesaler; nor did it buy excess quantities of gas to distribute to other companies for resale. Rather, it was engaged solely in the retail distribution of gas. City Gas was not attempting to use its market power as a natural gas producer or wholesaler (it was neither) to maintain its monopoly as a retail distributor of gas. It was simply choosing to maintain its operation exclusively on the retail level as it then existed, refusing to extend that operation to another level of the market. Whereas Otter Tail's anticompetitive conduct followed from its vertical integration, the alleged violative conduct here followed from City Gas' decision *not to* integrate vertically. For this reason, *Otter Tail* does not control.

Another point of distinction between *Otter Tail* and the present case concerns the status of the municipalities attempting to enter the retail distribution market in *Otter Tail* and that of Consolidated in the present case. For example, Elbow Lake, one of the municipalities that Otter

Tail refused to supply, had constructed its own generating plant. The town had also arranged for a supply of wholesale power from the Bureau of Reclamation, which had high voltage lines in the area but relied on Otter Tail and other companies to wheel power from its bulk lines to its wholesale customers. When Otter Tail refused, Elbow Lake applied to the Federal Power Commission (FPC) for an order requiring Otter Tail to interconnect to Elbow Lake and sell the wholesale power itself.[41] Elbow Lake had thus independently assumed the costs and faced the barriers of entering into the retail distribution market. Not only had Elbow Lake built its own generating facilities, it had also gained the Commission's approval to interconnect with Otter Tail, a process that involved litigation against Otter Tail in two forums, *see id.* at 371 & nn. 4 & 5, 93 S.Ct. at 1027 & nn. 4 & 5.

Here, in contrast, Consolidated has attempted to limit its entry costs: it wanted to purchase its gas from City Gas in order to enter the market in the most competitive posture and at the least possible expense. Whereas Elbow Lake completed the administrative process necessary to gain Commission approval of an interconnection to Otter Tail's system, Consolidated not only attempted to avoid the delay of such proceedings but also pointed to that delay as a justification for requiring City Gas to provide it with wholesale gas. Moreover, whereas Elbow Lake built an entire generating plant at great expense, Consolidated refused to invest even $250,000.00 to build the lateral pipeline that would have connected its pipesystem to FGT's line. In short, Elbow Lake was not attempting to obtain a free ride into the retail distribution market by forcing Otter Tail involuntarily to undertake a new function so that Elbow Lake could avoid the market's entry barriers and enjoy an enhanced

[41] Although the FPC could not order a company to wheel involuntarily, the FPC did have authority to order interconnections and sales at wholesale.

competitive position. That, I suggest, is exactly what Consolidated is attempting to do. To impose a duty to deal on City Gas in these circumstances, therefore, would be to say that any potential market entrant deserves a free ride into the market, on the best possible terms, and at the expense of those entities that have already entered the market on more difficult terms, with more risk, and at greater costs. The antitrust laws, in my view, do not support such a result.

Otter Tail provides no basis for imposing a duty to deal in the present case for one further reason: it fails to address the remedy problem that arises here. The *Otter Tail* decree, which the Supreme Court approved, mandates that Otter Tail supply power—either by selling its own at wholesale or by wheeling from other companies—to municipalities that have established their own retail distribution systems. The Supreme Court addressed the regulatory issues implicated by the decree,[42] but the Court conveniently failed to address the question of price: if Otter Tail had to supply power, then how much should it get paid? As the Supreme Court concluded, "the District Court . . . in any event has retained jurisdiction to enable the parties to apply for 'necessary or

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[42]The Court faced the question of whether the federal regulatory scheme limited the district court's power to fashion a decree. The Court concluded that the requirement of FPC approval of interconnections posed a potential limit on the decree. Because the decree mandated wholesaling only subject to Commission approval, however, the facts of the case did not implicate that limit. If, in light of future events, a problem were to arise, the Court indicated that the district court, which retained jurisdiction, could consider the problem then.

The Supreme Court noted, however, that the Federal Power Act gave the FPC no authority to order an electric company to wheel if the company had not voluntarily undertaken an obligation to do so, *see id.* at 375–76, 93 S.Ct. at 1028–29. Thus, the federal regulatory scheme had no impact on the district court's decree that Otter Tail wheel power. *Id.* at 376, 93 S.Ct. at 1029; *see Florida Power & Light Co. v. FERC*, 660 F.2d 668, 674–76 (5th Cir. Unit B Nov. 1981), *cert. denied*, 459 U.S. 1156, 103 S.Ct. 800, 74 L.Ed.2d 1003 (1983).

appropriate' relief." 410 U.S. at 381–82, 93 S.Ct. at 1031–32. Given the particular circumstances of the case, the district court on remand could presumably come up with a reasonable price term. Otter Tail already sold power at wholesale and wheeled power. Thus, the price terms in those existing transactions would provide a point of reference as the district court attempted to impose a price term for future transactions. In addition, Otter Tail did a substantial portion of its wheeling pursuant to a contract with the Bureau of Reclamation, a major supplier of wholesale power in the area. Many of the municipalities with which Otter Tail had refused to deal had themselves arranged to purchase wholesale power from the Bureau under the assumption that Otter Tail would wheel it. Thus, an even more specific reference point existed for imposing a price term with respect to many of the transactions that would arise pursuant to the district court's decree in *Otter Tail.*

The present case poses a different set of problems. *Otter Tail,* however, provides no solution. Given these circumstances, *Otter Tail* most certainly does not justify the imposition of liability in this case.

G. *MCI Revisited.*

I return finally to *MCI Communications Corp. v. AT & T,* 708 F.2d 1081 (7th Cir. 1982), *cert. denied,* 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983), focusing on an aspect of the Seventh Circuit's holding that, in my view, does control in the present case and that demonstrates the absence of liability under section 2 here. As I discuss above, *see supra* slip op. at 5173–5175, ____ – ____, the *MCI* case arose out of MCI's effort to enter the long-distance telephone market—an effort that required access to the Bell network's local exchange facilities. As I also discuss above, *see id.,* the Seventh Circuit held that AT & T had a duty to

allow MCI access to those local exchange facilities.[43] The court reached this conclusion by applying the essential facilities doctrine.

As the court stated:

> A monopolist's refusal to deal under these circumstances is governed by the so-called essential facilities doctrine. Such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a "bottleneck") can extend monopoly power from one stage of production to another, and from one market into another. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.

708 F.2d at 1132 (citing *Terminal R.R.*, 224 U.S. at 410–11, 32 S.Ct. at 515–16). According to this statement, the concern motivating the essential facilities doctrine is that an entity with monopoly power on one level of a market can use that power to gain control on another level of a market—i.e., by monopoly leveraging. In order to prevent this from occurring, the essential facilities doctrine imposes a duty to deal on the monopolist.

Applying this rationale to AT & T's refusal to provide local interconnections for MCI's FX and CCSA services, *see supra* slip op. at 5173–5175, ____ - ____, the court characterized AT & T's refusal as an attempt to use its monopoly over local exchange systems to maintain its monopoly over long-distance services. *Id.* at 1133. The court pointed to *Otter Tail* as authority for holding that AT & T's conduct was anticompetitive. The court characterized the rationale behind the *Otter Tail* decision as a concern "that market power in one market (transmission) was being used

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[43] In fact, the court held only that the evidence was sufficient to support the jury's finding that AT & T's refusal to deal was unlawful. 708 F.2d at 1132–33.

to further a monopoly in another market (retail distribution)." *Id.* (citing *Otter Tail,* 410 U.S. at 377–79, 93 S.Ct. at 1029–30). Based on this interpretation of *Otter Tail* and the facts in *MCI,* the court held that AT & T's conduct was anticompetitive. MCI wanted to compete with AT & T on the long-distance level, but to compete on that level, MCI required access to the exchange facilities at the local level. AT & T refused to provide MCI that access, and the court held that the refusal violated section 2.[4] That holding provides no support for the district court's decision in the present case. As I maintain throughout this part, the situation is entirely different here: City Gas has not engaged in monopoly leveraging.

A different aspect of the *MCI* opinion, however, is instructive here. The *MCI* court also held that AT & T had no duty to allow MCI to interconnect to AT & T's long-distance system (as opposed to the local exchange facilities) for multipoint service. Multipoint service consists of a private line for a customer between City A and City B, such as MCI's Chicago-to-St. Louis line. In requesting multipoint interconnections to AT & T's system, MCI wanted access to AT & T's multipoint line running from City B to City C, for example from St. Louis to Kansas City. This claim was entirely different from the claim concerning interconnections to Bell's local exchange system. In effect, multipoint interconnections required access to AT & T's own *long-distance* system rather than to the local exchange system, which was all that MCI required in order to operate its FX and CCSA services. The multipoint interconnections,

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[4] "MCI merely wanted access to the local exchange facilities on the same terms that AT & T had access to them. The Bell System, which consisted of twenty-three operating companies, provided the local exchange services. These companies were in the business of providing telephone service on the local level and of selling AT & T access to that service for its long-distance operation. Thus, the Bell System was obviously in the business of interconnecting long-distance lines to its local switching services.

therefore, involved only the long-distance market, the very market in which MCI was attempting to compete with AT & T. MCI claimed that it could not compete in that market—by providing multipoint service to its customers—unless AT & T provided access to its own lines. AT & T contended that MCI was simply trying to use AT & T's lines to provide service to customers in cities where MCI's current facilities could not reach, even though MCI was authorized to build facilities that could reach those cities.

The Seventh Circuit rejected MCI's claim, holding that the denial of interconnections for multipoint service could not form a basis of liability. *Id.* at 1149. The court reasoned that

> MCI's primary business was to build precisely the type of facilities to which it sought access from the Bell System. There was no sufficient explanation as to why MCI, on the one hand, was building its own network, and, on the other, was entitled to access in the interim to AT & T's facilities. Thus, the jury lacked sufficient evidence to conclude that these interconnections were essential.

Id. at 1148. The court continued:

> As a matter of antitrust liability, . . . can an entrant which actually builds its own facilities between Chicago and Milwaukee, for example, thereby gain entitlement to use all the far-flung facilities of the Bell System? Is its entitlement based on its expressed intention to duplicate major portions of the Bell System on a national basis? Could it claim entitlement before (or without) building any facilities of its own? We think the ramifications of the demand for multipoint service are troubling and complex, and that under the circumstances of this case . . . , the denial of interconnections for multipoint service cannot form a basis of liability.

Id. at 1149.[45]

I suggest that this holding controls in the present case. Like MCI, Consolidated had no basis for claiming an entitlement to buy wholesale gas from City Gas. As in *MCI,* Consolidated's primary business was to provide the same service as City Gas provided. City Gas operated a retail distribution system; Consolidated wanted to do exactly the same. Like MCI, Consolidated claimed that it could not compete in the retail distribution market unless it had access to City Gas' system. As in *MCI,* Consolidated wanted access to City Gas' system so that it could provide the same service that City Gas provided and compete with City Gas on the same, and only, level of the market on which City Gas operated. Consolidated, like MCI, had every right to compete in the market at issue, and City Gas, like AT & T, could do nothing to prevent Consolidated from competing. As the *MCI* court indicated, however, City Gas had no duty to help Consolidated enter into competition against it. Like AT & T, which was not in the business of providing interconnections for other long-distance services (as compared to the local Bell companies, which were in the business of providing interconnections for long-distance systems), City Gas was not in the business of selling gas at wholesale. The refusal to deal in the present case, like AT & T's refusal to provide multipoint interconnections in *MCI,* related only to a single level of market operation and involved no attempt to leverage into another market level. Following the rule in *MCI,* if Consolidated wanted to provide the same service as provided by City Gas, which

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[45]The court reached this conclusion based on its application of antitrust principles. It considered those principles independently of the effect that a regulatory determination regarding such interconnections might have. As the court admitted, its conclusion might have been different if the FCC had authorized or mandated that AT & T provide the interconnections. Without such an FCC order, however, the antitrust laws imposed no duty on AT & T to provide the interconnections. *See id.* at 1149.

operated on a single market level as a non-vertically integrated entity, then Consolidated itself had to construct the facilities that such an operation required.

H. *Conclusion.*

As I discuss above, *see supra* slip op. at 5181–5182, ____ – ____, the antitrust laws do not impose a positive duty to help a competitor. The antitrust laws proscribe conduct that inhibits competition; the laws, however, do not purport to facilitate competition by imposing a duty on a company to help another company into competition. As the Seventh Circuit stated in *Olympia*, a firm

> has no general duty to help its competitors. . . . "There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter." . . . A monopolist has no duty to reduce its prices in order to help consumers, . . . and no duty to extend a helping hand to new entrants. . . .

797 F.2d at 375–76 (quoting *SPS Technologies*, 694 F.2d at 512–13) (citations omitted). This is especially true when such a duty would require the company to undertake a course of dealing in which it does not already engage—such as providing interconnections or selling gas at wholesale where it normally does not. Courts must respect rational decisions of economic actors. If an entity has opted not to undertake a course of operation, courts have no business second-guessing that decision. In addition, the imposition of a duty to deal in such circumstances would encourage economic inefficiencies and promote inequity. An attempt by any company to develop a product or service—i.e., to compete in a market—requires initiative, innovation, and risk-taking. Our antitrust laws are designed to ensure that every company has the opportunity to compete under these terms, but not to require that a company which has made this investment in capital and taken this initiative and risk provide a free ride

into the market for every potential competitor that comes along. Such a policy would be unfair to those companies that have made investments and taken risks; moreover, it would discourage businesses from taking initiative, assuming risk, and making investments of capital in the first place. A policy with these results would not, in my view, be a good one. More importantly, it is not the policy that our antitrust laws were designed to promote.

As the above sections demonstrate, no legal basis exists for requiring City Gas to enter the wholesale business and supply Consolidated with gas. The factual circumstances of this case are fundamentally different from typical refusal-to-deal cases, and given the circumstances here, City Gas' refusal to deal gives rise to no inference of anticompetitive intent under any of the approaches used by courts to evaluate circumstantial evidence. Finally, as I discuss in more detail in the next part, the present case presents extreme administrative problems for the imposition of an effective remedy—problems that Congress could not have intended the courts to solve. City Gas' conduct, therefore, does not constitute a violation of section 2.

VI. THE FIFTH AMENDMENT

As part V demonstrates, this case is not a typical refusal-to-deal case. In the typical refusal-to-deal case, a defendant participates in the market at issue, selling a product or service either directly to a plaintiff (in previous transactions) or to other customers. The defendant then attempts to charge the plaintiff a higher price than it charges other customers or simply refuses outright to deal with the plaintiff. As a result, the plaintiff[46] brings suit under the Clayton Act, 15 U.S.C. §§ 15, 26, contending that the defendant has violated section 2 of the Sherman Act by

[46]The government might also bring a civil enforcement action under section 4 of the Sherman Act, 15 U.S.C. § 4, to enjoin the defendant from refusing to deal in violation of section 2. *See infra* note 11.

refusing to supply the product at issue to the plaintiff and seeking an injunction ordering the defendant to supply the product on the same terms as those given to the defendant's other customers and also seeking damages.[47] If the court concludes that the defendant has violated section 2 of the Sherman Act by charging the plaintiff higher prices or refusing outright to deal with the plaintiff, then the court orders the defendant to deal with the plaintiff and to do so at the same price that the defendant has set in its dealings with other customers.

In the present case, City Gas has never sold gas for resale to anyone.[48] In deciding not to supply gas to

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[47]As I elaborate below, *see infra* slip op. at 5207–5212, ____ – ____, the private plaintiff may also seek, in addition to an injunction, damages for profits lost between the refusal to deal and the date of final judgment; or, if injunctive relief would not provide a remedy because the refusal to deal forced the plaintiff to go out of business, then the plaintiff may seek damages for loss of its going concern value and damages for profits lost in the interim.

[48]The district court and panel made much of the fact that City Gas "had, in fact, entered into a contract with a third party [Florida Gas] to sell its gas for resale." 880 F.2d at 300, *see* 665 F.Supp. at 1510. This contract, however, was merely executory: City Gas never performed. As the panel claimed, this contract no doubt provides evidence that City Gas had "*power*" to sell gas at wholesale, 880 F.2d at 301 (emphasis in original), but the contract is not evidence that City Gas ever actually did sell at wholesale. As I discuss in part IV, that City Gas might have possessed the *power* to sell at wholesale is neither here nor there; rather, what is significant is that City Gas *legitimately chose not to exercise* that power—not selling to Consolidated, to Florida Gas, or to any other firm. And in making this choice, City Gas did nothing wrong.

As also I discuss in part IV, the contract would not be relevant even if the parties had not abandoned it: the contract would have involved a different geographic market than the market involved in the present case. Perhaps the best evidence of this contract's irrelevance, though, is the fact that district court never looked to it as a basis for establishing a selling price in its injunctive order requiring City Gas to supply wholesale gas to Consolidated. The district court delegated the task of establishing a

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Consolidated, City Gas did not discriminate against Consolidated by attempting to charge Consolidated a higher price than City Gas charged its other customers or by entirely denying Consolidated a service that City Gas provided to other customers. Under these circumstances, the district court could not conclude that City Gas violated section 2 by treating Consolidated differently than City Gas treated its other customers. Nor could the district court require City Gas to sell wholesale gas to Consolidated at the same price that City Gas sold gas to its other customers. Such a decree would be meaningless since City Gas has never sold wholesale gas to any firm at any price.

Under the typical refusal-to-deal cases, therefore, City Gas did nothing wrong. It merely operated as a retail gas distributor in its established service area and decided not to deal at all on the wholesale level. The district court, however, developed a new rule of law: it held that section 2 of the Sherman Act imposed a positive duty on City Gas to change the nature of its operation and sell wholesale gas to Consolidated so that Consolidated could enter the retail distribution market and compete with City Gas.[9] The

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selling price to the FPSC. *See* 665 F.Supp. at 1512, 1534, 1545. In so doing, the district court implicitly found the Florida Gas contract to be unreliable as evidence of City Gas' wholesale gas price.

[9]In articulating this new rule of law, the district court should have distinguished the body of antitrust cases in which courts have held that the antitrust laws impose no positive duties, but only negative duties. *See, e.g., Aspen,* 472 U.S. at 600–01, 105 S.Ct. at 2856–57; *United States v. Colgate & Co.,* 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919); *Olympia,* 797 F.2d at 376 (7th Cir.1986); *Florida Fuels, Inc. v. Belcher Oil Co.,* 717 F.Supp. 1528, 1532 (S.D.Fla.1989). These cases teach that a company has no duty to foster competition or to aid a competitor but that a company may not do anything to prohibit competition or to prevent a company from competing. Under the district court's new rule, which the court today upholds, section 2 would seem to impose a positive duty on City Gas, requiring it to sell at wholesale to Consolidated so that

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district court applied this rule in the present case to take a portion of City Gas' gas supply and give it to Consolidated. This new rule thus requires City Gas—a company that has done nothing wrong—to undertake a new level of operation and engage in a forced sale of wholesale gas to Consolidated.

In my view, Congress could not have intended section 2 of the Sherman Act to mandate such a result. This becomes apparent when one considers the practical implications of the rule's enforcement, which the district court, as well as this court today, has entirely failed to do. As those implications suggest, the rule will be impossible to apply. The district courts of this circuit will confront severe difficulties in fashioning remedies under the rule. In addition, the rule's application will frustrate the very purposes behind the antitrust laws. I develop these points in the following section by analyzing how a court would apply this new rule to the facts of the present case.

I first introduce the idea that this rule implicates the fifth amendment takings clause. As I note above, because City Gas has never sold gas at wholesale and has therefore established no price for such sales, the court under these circumstances must set a selling price if it is to require City Gas to sell to Consolidated. That price must satisfy the fifth amendment's just compensation requirement.[50] I then consider what finding the just compensation clause requires under the present facts. Next, I discuss some further

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Consolidated can compete, even though City Gas has never voluntarily sold wholesale gas to any firm. Although I see no grounds for distinguishing these cases from the present case, I assume for purposes of discussion that their inapplicability to the present case could be explained.

[50]In the typical refusal-to-deal case, the fifth amendment poses no problem: the court requires the defendant to sell at its already-established selling price, applying a presumption that the defendant has set the price that it must receive in order to obtain just compensation.

implications of the fifth amendment, which suggest that the rule is impossible to apply and leads to results that are inconsistent with the purposes behind the antitrust laws. Based on this discussion, I conclude that Congress could not have intended section 2 to support such a rule. The rule, therefore, should be struck down.

Because our court today nevertheless upholds this impossible rule, I analyze in section B the district court's errors in attempting to apply it and conclude that the judgment should be vacated and the case remanded for further proceedings as I describe.

A. *Implications of Enforcing the Rule.*

1. The Fifth Amendment.

The fifth amendment provides in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const.Amend. 5. Courts have long held that the fifth amendment applies to utility rates set by federal and state regulatory agencies: in order to satisfy the just compensation clause, rates must not be "so 'unjust' as to be confiscatory," *Duquesne Light Co. v. Barasch*, 488 U.S. 299, ____, 109 S.Ct. 609, 615, 102 L.Ed.2d 646 (1989). *See, e.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747, 770, 88 S.Ct. 1344, 1361, 20 L.Ed.2d 312 (1968); *FPC v. Natural Gas Pipeline Co. of Am.*, 315 U.S. 575, 585–86, 62 S.Ct. 736, 742–43, 86 L.Ed. 1037 (1942); *Tenoco Oil Co. v. Department of Consumer Affairs*, 876 F.2d 1013, 1020 (1st Cir.1989); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1175 (D.C.Cir.1987). This line of cases indicates that the fifth amendment does not proscribe rate regulation in and of itself; rather, it proscribes rate regulation *at a price that denies just compensation.* The Supreme Court has therefore articulated a standard—the "historical cost basis"—for reviewing rate regulations to determine whether they satisfy this constitutional mandate. *See Barasch*, 489 U.S. at ____, 109 S.Ct. at 616–17; *FPC v. Hope Natural Gas*

Co., 320 U.S. 591, 603–05, 64 S.Ct. 281, 288–89, 88 L.Ed. 333 (1944).[51]

Assuming the facts of the present case, a different category of regulation is involved. The regulation here goes beyond ratemaking to require City Gas to provide a service that it did not normally provide. If administrative price regulation implicates the fifth amendment, then this more intrusive category of regulation obviously implicates the fifth amendment as well.[52] Thus, if this "taking" is to pass

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[51]The *Hope* Court approved historical cost as a basis for calculating rates. Under this rule, just compensation is provided by "[r]ates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed." *Hope*, 320 U.S. at 605, 64 S.Ct. at 289.

The rationale behind this rule, as one judge has stated, is that regulation

> was part of the original compact between investors and the state. Rate regulation is, in theory, the substitute for competition. The state stands in the shoes, as it were, of competitors, keeping the utility within bounds that would be drawn by market forces in a non-monopolistic market. Whether economically sound or not, utility rate regulation in itself raises no constitutional concerns.

Jersey Central, 810 F.2d at 1190 (Starr, J., concurring). A crucial principle behind this rule, therefore, is the idea that the utility companies have *voluntarily* undertaken to operate in a regulated industry, enjoying the benefits of a natural monopoly in return for submitting to reasonable regulation of their rates. As a corollary to this principle, the utility company may, of course, choose not to participate in the industry any longer: although the regulations limit the companies' rates, those regulations, as this court has itself observed, do not require "the regulated group . . . to participate in the regulated industry." *Whitney v. Heckler*, 780 F.2d 963, 972 (11th Cir.1986), *cert. denied*, 479 U.S. 813, 107 S.Ct. 65, 93 L.Ed.2d 23 (1986).

[52]Application of established takings cases also supports this conclusion. In this case, the "compact" rationale, *see supra* note 51, under which utilities voluntarily subject themselves to regulation in return for certain benefits, does not apply. Rather, "the regulated group is . . . required [by a federal court implementing the Sherman Act] to participate in the regulated industry," *Whitney*, 780 F.2d at 972, and

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courts have considered such compulsion to be an important indication of a fifth amendment taking. Such a regulation could still be enforced if the company was provided just compensation. Because the company acts under compulsion, however, rather than voluntarily submitting to regulation as in the ratemaking cases, the court should apply a more rigorous standard for just compensation than the relatively broad "zone of reasonableness" standard developed under *Hope*. Before turning to the question of just compensation, I first analyze this case under established takings principles.

As the Supreme Court has emphasized, "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S.Ct. 3164, 3176, 73 L.Ed.2d 868 (1982); *see, Nollan v. California Coastal Comm'n*, 483 U.S. 825, 830–32, 107 S.Ct. 3141, 3145, 97 L.Ed.2d 677 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80, 100 S.Ct. 383, 393, 62 L.Ed.2d 332 (1979); *see also FCC v. Florida Power Corp.*, 480 U.S. 245, 251–53, 107 S.Ct. 1107, 1112, 94 L.Ed.2d 282 (1987). In fact, the Court has held that a permanent physical occupation of property by the government constitutes a *per se* taking. *See, e.g., Loretto*, 458 U.S. at 434–36, 102 S.Ct. at 3175–76; *see also Florida Power Corp.*, 480 U.S. at 251–53, 107 S.Ct. at 1112. The severity of such an invasion warrants this conclusion without requiring analysis under the "multifactor inquiry generally applicable to nonpossessory governmental activity." *Loretto*, 458 U.S. at 440, 102 S.Ct. at 3178–79; *see Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978) (describing multifactor inquiry); *see also infra* (applying inquiry in present case). The Supreme Court has emphasized, however, that this permanent-physical-occupation rule is "very narrow." *See, e.g., Florida Power*, 480 U.S. at 251–53, 107 S.Ct. at 1112; *Loretto*, 458 U.S. at 441, 102 S.Ct. at 3179.

In my view, this case presents a close question concerning the *Loretto* rule's applicability. *Loretto* involved a state regulation that required landlords to allow cable television companies to install cable facilities on their property. The Court found that the installation involved a permanent, physical attachment and thus held that it constituted a *per se* taking. *Loretto*, 458 U.S. at 441, 102 S.Ct. at 3179. As the Court has subsequently indicated, a key rationale behind that holding was the fact that the statute *required* landlords to allow cable installation. On this basis, the Court in *Florida Power* distinguished a federal statute, the Pole Attachments Act, 47 U.S.C. § 224 (1982), which authorized the FCC to regulate the terms of contracts between utility companies and cable

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operators for the attachment of cable to utility poles, from the regulation in *Loretto*. As the *Florida Power* court discussed,

> while the statute we considered in *Loretto* specifically *required* landlords to permit permanent occupation of their property by cable companies, nothing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators.

480 U.S. at 251, 107 S.Ct. at 1112. The Court in *Florida Power* expressly stated, however, that it did "not decide . . . what the application of *Loretto* . . . would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." *Id.* at 251 n. 6, 107 S.Ct. at 1112 n. 6. The present case seems to present exactly this question, and to the extent that the element of compulsion explains the rule in *Loretto*, that rule should apply here.

Another key factor in the *Loretto* decision was the nature of the invasion: the permanence of the facilities and the landlord's lack of control over them and their installation. In my view, the invasion in the present case is factually similar. As in *Loretto*, the district court's mandate requires a permanent, physical intrusion onto City Gas' property. The intrusion is permanent in two ways: first, a pipe must be constructed *permanently* to attach City Gas' pipesystem to Consolidated's pipesystem; and second, this interconnecting pipe will permanently drain natural gas from City Gas' pipesystem and into Consolidated's pipesystem. As the Court has previously held, such a continuous arrangement constitutes a "permanent physical occupation" for purposes of the *Loretto* rule. *See Nollan*, 483 U.S. at 832, 107 S.Ct. at 3145 (easement giving individuals "permanent and continuous right to pass to and fro, so that the real property may continuously be traversed").

I also think that City Gas, like the landlord in *Loretto*, lacks control over this invasion. City Gas has no control over the invasion in that City Gas cannot refuse to provide gas. But City Gas also lacks control over the invasion in a secondary sense that the *Loretto* Court also held to be important. The Court there referred to the landlord's lack of control over the "placement, manner, use, and possibly the disposition of the installation" and suggested that the outcome might have been different if the landlord had such control. 458 U.S. at 440 n. 19, 102 S.Ct. at 3179 n. 19. Similarly, in *Nollan*, the Court noted the property owner's inability to regulate the continuous flow of traffic across his property. *See* 483 U.S. at 830–32, 107 S.Ct. at 3145. Here, City Gas will have to supply gas according

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constitutional muster, then a court confronting these facts

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to the terms mandated by the district court: in set amounts, at set times, and at set prices. The fact that City Gas owns its own pipesystem is of no significance. The district court, and not City Gas, decrees the terms of the arrangement. I would think, therefore, that *Loretto* controls: if section 2 of the Sherman Act requires City Gas to deal under these circumstances, that constitutes a *per se* taking.

Even if *Loretto* does not control, this forced supply constitutes a taking under the *Penn Central* multifactor inquiry. That inquiry looks to (1) the economic impact of the regulation, (2) the extent to which it interferes with investment-backed expectations, and (3) the character of the governmental action. *See Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659. Imposing a duty to deal will have a significant economic impact on City Gas. With an investment of time and money, City Gas will have to divert some of its own gas supply to Consolidated and also administer the actual process of supplying gas to Consolidated. In addition, by enabling Consolidated to compete without having to undertake the costs associated with entry into the natural gas supply business, the duty to deal might force City Gas to change its retail distribution business: in order to avoid losing customers to Consolidated, City Gas might (subject to the FPSC's approval) have to lower its retail prices, if it can do so without loosening the safety controls of its operation; it might have to undertake a more aggressive marketing strategy, which would in turn increase its operating costs; it might also lose potential business opportunities—*e.g.*, the ability to extend its services to customers in territory occupied by Consolidated. In the event of a gas shortage, moreover, City Gas might have to curtail delivery to its own customers in order to continue supplying Consolidated.

As these considerations suggest, the duty to deal will also interfere with City Gas' investment-backed expectations. By changing the market's regulatory structure and altering the nature of competition in that market, the duty to deal will significantly affect these expectations.

Finally, the character of the district court's invasive action suggests a taking. This is not a case where a government regulation merely restricts the use of property. Rather, the case involves an actual physical invasion of City Gas' property: gas is removed from its pipesystem and transferred to Consolidated's pipesystem. Even under the multifactor inquiry, therefore, this case involves a taking.

must set a price in its injuction that provides City Gas with just compensation for its gas.[53]

The fifth amendment requirement means more though: it also controls the court's determination of whether City Gas violated the duty to deal imposed under this new rule. The fifth amendment protects City Gas from having to sell its gas at a price lower than the just compensation price. Thus, City Gas violated its duty to deal under section 2 only if it refused to deal *at the fifth amendment price.*[54] The

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[53]In deciding this case, of course, the court faces the question of just compensation in a different procedural context than it would in the standard ratemaking cases that I cite above. Rather than *reviewing* a state or federal agency's rate determination to decide whether it passes constitutional muster, the court, as I explain in the text below, must itself *set* the just compensation price in order to determine the issue of liability in the case.

In addition, this "taking" must satisfy the fifth amendment's "public use" requirement. That requirement, however, has been interpreted broadly. As the Supreme Court stated in *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240, 104 S.Ct. 2321, 2329, 81 L.Ed.2d 186 (1984), "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." *See also Berman v. Parker*, 348 U.S. 26, 32–33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). Thus, the courts conduct " 'an extremely narrow' " review of "a legislature's judgment as to what constitutes a public use," *Midkiff*, 467 U.S. at 240, 104 S.Ct. at 2328 (quoting *Berman*): "the Court . . . will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation,' " *id.* at 241, 104 S.Ct. at 2329 (quoting *United States v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 680, 16 S.Ct. 427, 429, 40 L.Ed. 576 (1896)). I assume, for the sake of discussion, that the taking in the present case would satisfy this requirement.

[54]In effect, antitrust doctrine already reflects this idea by holding that a party is not liable under section 2 for a refusal to deal if a valid business justification supports that party's decision. *See, e.g, Mid-Texas Communications Sys., Inc. v. AT & T*, 615 F.2d 1372, 1388–89 (5th Cir.), *cert. denied sub nom. Woodlands Telecommunications Corp. v. Southwestern Bell Tele. Co.*, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980); *Poster Exchange*, 431 F.2d at 339; *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 488 (1st Cir.), *cert. denied*, 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952).

court must make this determination by comparing the fifth amendment price to the selling price actually offered by City Gas and evaluating whether that offered price was unreasonably high, thus constituting a refusal to deal in violation of section 2. The court must therefore set the fifth amendment price in order not only to fashion its injunction, but also to evaluate whether City Gas violated its duty to deal in the first place.

In addition, the fifth amendment price controls the court's determination of whether Consolidated can satisfy the injury-in-fact requirements of sections 4 and 16 of the Clayton Act. As I discuss below, *see infra* slip op. at 5206–5207, ____ - ____, in order to prove injury, or the likelihood of injury, for purposes of sections 4 and 16, Consolidated must show that it could have turned a profit by purchasing wholesale gas from City Gas *at the fifth amendment price.* If Consolidated could not have turned a profit after purchasing gas at that price, then City Gas' refusal to deal did not injure Consolidated, and Consolidated has no standing under the Clayton Act to point to that conduct as a basis for liability under section 2. In order properly to decide this issue, however, the court must first find the fifth amendment price. I now consider the application of these fifth amendment requirements to the present facts.

2. Finding a Fifth Amendment Price.

Assuming the facts of the present case, the court finds as follows: City Gas initially offered to sell the gas at cost[55] plus ten cents per therm. Consolidated eventually made a counter offer to buy the gas at cost plus two and one-half cents per therm. City Gas rejected the offer as too low, but then lowered its initial price to cost plus seven cents per

[55]In its "cost" figure, the district court below included only the price that City Gas paid for its wholesale gas and not the overall costs that City Gas incurred in its retail gas operation. *See* 665 F.Supp. at 1511.

therm. Consolidated later proposed a price of cost plus five cents per therm. The parties reached no agreement and the negotiations ceased. *See* 665 F.Supp at 1510.[56]

Now, in order to prove its case under the new rule, Consolidated must make two showings: it must (1) establish a selling price that will justly compensate City Gas; and (2) prove that City Gas' price of cost plus seven cents per therm was substantially higher than the just compensation price[57]

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[56]As I discuss above, *see supra* notes 5 & 7, the district court below put a spin on these facts, characterizing City Gas as the bad guys and Consolidated as the good guys. The district court suggested that City Gas knew its initial offer of cost plus ten cents per therm was too high and that the FPSC would never approve it. In addition, the district court pointed to testimony by City Gas' Vice President that "he made no attempt to ascertain a reasonable price for direct gas sales to Consolidated, and that he came up with the cost plus ten cents terms 'out of the air.'" *Consolidated*, 665 F.Supp. at 1510.

This characterization assumes that City Gas had a duty to enable Consolidated to enter the natural gas business at as little cost as possible so that it could most effectively compete with City Gas. Because City Gas did not want, and did not seriously attempt, to do this, the court characterized its behavior as bad. This characterization is counterintuitive. City Gas did exactly what one would expect any rational business firm to do: it continued operating as it normally did, doing nothing illegal to obstruct a potential competitor's entrance into the market but also doing nothing to facilitate its entrance into the market. To characterize this type of conduct as bad is to adopt a position totally at odds with normal business practices in this country.

[57]Consolidated must show that City Gas' price exceeded the fifth amendment price by a *substantial* amount. If that point is fairly debatable, then City Gas will not be subject to liability.

I suggest that Consolidated might also have to show that its counter offer was reasonable in light of the fifth amendment price. If Consolidated offered a price, indicating that it would *pay no more* for the gas, and the fifth amendment price substantially exceeded Consolidated's offered price, then Consolidated has no claim under section 2.

and therefore constituted a refusal to deal under section 2.[58] I next consider how Consolidated can establish the just compensation price.

A just compensation price provides a property owner with a reasonable rate of return on its investment. In a typical takings case, for example where the government institutes a condemnation procedure and takes Blackacre so that the interstate highway can become two lanes wider, the government compensates the owner for Blackacre's fair market value, or "what a willing buyer would pay in cash to a willing seller." *United States v. Miller*, 317 U.S. 369, 374, 63 S.Ct. 276, 280, 87 L.Ed. 336 (1943).[59] The present facts, however, do not describe a typical takings case. Rather than the one-shot taking of Blackacre to widen the interstate highway, the present facts involve a *continuous* taking of a portion of City Gas' assets. The fair-market-value standard obviously does not provide an acceptable formula for calculating a reasonable rate of return in a case involving this type of continuous taking. *See Hope*, 320 U.S. at 601, 64 S.Ct. at 287 ("The heart of the matter is that rates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be

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[58]Consolidated bears the burden of proof on this point. In arranging the order of proof however, the court might apply a presumption requiring City Gas to come forward with all of the evidence, on the ground that the evidence is exclusively in its possession and that fairness requires City Gas to proceed first. City Gas will then have to present evidence demonstrating that the price it quoted to Consolidated was necessary to provide just compensation. See *infra* slip op. at 5201–5205, ____ – ____, for a discussion of the factors relevant to such a showing. The burden, however, will then shift to Consolidated to rebut City Gas' just compensation price.

[59]Blackacre's fair market value can be determined based on the selling price of comparable pieces of property. Even if no comparable sales have occurred in the market, the value can be determined by constructing a hypothetical market and taking expert testimony regarding Blackacre's best-use price.

anticipated.") Consolidated must therefore find an alternative basis for establishing a fifth amendment price.

As one possibility, Consolidated might point to a wholesale gas price set by a company similarly situated to City Gas, claiming that that price will provide City Gas just compensation. That company has to be virtually identical to City Gas in terms of the factors that a gas company takes into account in setting its wholesale price, *see infra*. For example, the company must deal in both the retail and wholesale markets. No such company exists under the facts of the present case.[60] Nor can Consolidated point to any other existing operation, under the facts here, as a basis for calculating the just compensation price.[61] Instead, Consolidated has to establish the fifth amendment price based on City Gas' actual costs, which is in effect the

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[60]If such a company had existed in the present case, then the district court below, in fashioning its injunction requiring that City Gas sell to Consolidated, would not have had to delegate to the FPSC the task of setting a selling price. *See* 665 F.Supp. at 1512, 1534, 1545. Instead, it could have looked to that other company's wholesale gas price as evidence of City Gas' just compensation price.

Even if such a company could be found, its selling price would probably not be controlling. That company would be a regulated company, selling its wholesale gas at rates approved by the FPSC. As such, that company would have voluntarily undertaken to sell at wholesale in a regulated market, subjecting itself to the FPSC's rates in return for the benefits of operating in a regulated industry. *See supra* note 51. That price would not be presumptively fair to City Gas, a company that has not voluntarily undertaken to deal at those FPSC-approved rates.

[61]Consolidated obviously could not point to the price charged by wholesalers like FGT as a basis for the just compensation price. City Gas has opted not to sell in the wholesale market, applying its resources to the retail market instead. As a retail distributor, City Gas' fixed and operating costs are entirely different from those of a wholesaler like FGT: City Gas' investments are committed to a variety of expenditures that are unnecessary for a wholesale operation. In order to receive a reasonable return on its investment, therefore, City Gas must charge a different price than FGT charges.

historical-cost basis of the *Hope-Barasch* cases. *See supra* note 51 & accompanying text.

Under this inquiry, Consolidated must establish a variety of factors, for example: (1) the price at which City Gas itself purchases the gas; (2) City Gas' operating costs in purchasing and delivering the gas; (3) City Gas' fixed costs in purchasing and delivering the gas; and (4) any business opportunities that City Gas might lose as a result of selling gas to Consolidated.[62] In addition, a court faced with the present facts must take into account the risks assumed by City Gas' investors. The court must determine the return needed to compensate those investors for that risk, and the greater the risk, the higher the rate of return has to be.[63] The court must evaluate all of the evidence and, adopting the role of a ratemaker, set a price that enables City Gas to sell at a reasonable profit. Consolidated must then prove that City Gas' offered price was unreasonable.[64] In addition, the court must determine, for purposes of the injury-in-fact requirement of sections 4 and 16 of the Clayton Act, whether Consolidated can turn a profit at the fifth amendment price.

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[62]In order to evaluate this last factor, the court considers, in part, probable changes in the market value of Consolidated's stock.

[63]As the *Hope* Court stated:

> [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

320 U.S. at 603, 64 S.Ct. at 288.

[64]That is, Consolidated must prove that the price City Gas offered Consolidated was *substantially* higher than the fifth amendment price. *See supra* note 57.

Courts have a difficult enough time interpreting and applying the historical-cost test in a reviewing capacity. *See, e.g., Jersey Central,* 810 F.2d at 1175.[55] I suppose, however, that if an administrative agency can establish a rate by taking evidence concerning these factors, then the court can adopt the role of a regulator and do so too. Of course, the just compensation price established by the court under the present facts must satisfy a more stringent standard than the standard that applies to rates set by a regulatory agency. *Cf. id.; supra* note 51.[56]

In order to demonstrate that Congress could not have intended section 2 to support such a rule in the first place, I continue with this analysis and assume, for the sake of discussion, that Consolidated manages to establish (1) the fifth amendment price in this case, (2) that City Gas breached its duty under section 2 by offering a price that was

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[55]In that context, moreover, the courts' task is eased by a high initial burden of proof on the utility company to show that the rate is unreasonable before the test even applies. In addition, the courts apply a broad standard of reasonableness in reviewing rates set by regulators. In part, that standard reflects institutional concerns and ensures the courts' deference to agencies' determinations. That standard also reflects the nature of the compact between utility companies that have voluntarily entered a regulated market and the state, which regulates the market. *See supra* note 51. In the present case, however, City Gas has not voluntarily entered such a compact. A price that might be satisfactory in the regulatory context, therefore, will not necessarily provide City Gas with a reasonable rate of return on its investment here.

[56]As I develop below, *see infra* slip op. at 5212–5215, ____ – ____, the district court in this case did not find a fifth amendment price, let alone evaluate City Gas' offered price in light of that fifth amendment price. The district court, therefore, never properly decided whether, in light of the fifth amendment price, City Gas actually refused to deal under section 2. In addition, having failed to find a fifth amendment price, the district court did not properly determine whether Consolidated actually suffered injury as a result of City Gas' refusal to deal. Finally, because of this failure to find a fifth amendment price, the remedies fashioned by the district court were also erroneous: as I discuss below, *see id.*, proper remedies in this case must be based on the fifth amendment price.

unreasonably high in light of the fifth amendment price, and (3) that Consolidated actually suffered damages as a result of City Gas' refusal to deal. I assume further that the court orders City Gas to supply wholesale gas to Consolidated at the fifth amendment price. As I describe in the next section, however, the matter would not end there.

3. Changed Circumstances.

Assume that City Gas abides by the court's decree and begins supplying gas for resale to Consolidated. A few months later, the cost of supplying gas to Consolidated increases. As a result, the price set by the court in its decree no longer justly compensates City Gas, and City Gas moves for a modification of the decree to increase the selling price. Consolidated opposes the increase. At that point, the court, which has retained jurisdiction, again has to assume the role of regulator and undertake an extensive inquiry into the facts to determine whether a price increase is justified.

The increase in City Gas' costs can result from any of several factors: City Gas' purchase price from FGT might increase; City Gas' own delivery costs might increase; or, City Gas might make some business decisions that increase its operating costs. Assume here that City Gas decides that it must spend more money on advertising in order to compete with Consolidated: after all, Consolidated entered the market in order to compete with City Gas, which is exactly what the district court's injunction was designed to achieve.

At the hearing, therefore, City Gas argues that the just compensation price must include the legitimate expenses of competing with Consolidated. If the fifth amendment price does not reflect these expenses, City Gas contends, then the company will eventually have to pass them off to its customers by increasing its retail price (assuming the FPSC

will approve such a rate increase).[67] If the court denies the rate increase, according to City Gas, that will give Consolidated a decisive competitive advantage and will therefore defeat the purpose behind the court's injunction—i.e., enabling both companies to compete on equal terms. City Gas argues that denial of the increase will give Consolidated a free ride at City Gas' expense and that the fifth amendment surely protects it from that result.

Consolidated, on the other hand, argues that if the court increases the selling price, then City Gas will gain a competitive advantage in the marketplace. Consolidated's costs will increase; it will, in turn, have to pass those costs off to its customers, see *supra* note 67; and as a result, it will be unable to compete with City Gas' lower retail prices. That result, says Consolidated, is inconsistent with the policies behind the antitrust laws.

What is the court to do in such a situation? I suggest that whatever it does, it cannot serve the purposes of the antitrust laws while at the same time satisfying the fifth amendment's requirements. Whether the court grants or denies City Gas' request for an increase in the selling price, its decision will harm one segment or another of natural gas consumers. If the court grants the increase, then Consolidated's consumers will eventually bear the burden of Consolidated's increased costs. If the court denies the increase, then City Gas' consumers will bear the burden of City Gas' increased costs. Surely Congress could not have intended to create a rule that inevitably harms consumers: harm to consumers is exactly what Congress designed the antitrust laws to prevent.

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[67] City Gas' shareholders will initially absorb these expenses through a depletion of City Gas' resources but will then pass them off to the customers through rate increases. If the FPSC does not approve rate increases, however, the shareholders will assume the burden themselves. In that case, City Gas will eventually go out of business (when its resources are exhausted).

The court might attempt to avoid this dilemma by placing controls on the competition between City Gas and Consolidated. For example, the court could allocate parts of the territory within the area of competition to each of the companies and prohibit them from competing for control of the other company's territory. Such a forced allocation, however, would run afoul of the fifth amendment by restricting City Gas' ability to compete and expand, if not by actually limiting City Gas' present distribution area.

Finally, if the court denies the rate increase, what will it do when City Gas' customers, who will have to pay more for their gas, seek to intervene in the case on the ground that the court's decision infringes upon rights accorded them (by implication) under the antitrust laws? If the court instead grants the increase, then Consolidated's customers rather than City Gas' customers will seek to intervene. In short, whichever way the court decides the question, consumers will be harmed.

Congress clearly could not have intended section 2 to support this new rule of liability. That rule, as my discussion demonstrates, forces the courts to adopt the role of a regulatory agency, an agency charged, moreover, with an impossible task and facing a set of never-ending problems. In addition, the rule frustrates the purposes behind the antitrust laws: it creates situations in which, however a court rules, consumers will be harmed. A rule that leads to such results is not consistent with Congress' intent in passing section 2.

B. *The District Court's Application of the Rule Below.*

This court today, nevertheless, upholds this impossible rule. Even under this rule, however, I would vacate the district court's judgment and remand the case for further proceedings. The district court failed to find a fifth amendment price in the present case, and that failure created reversible error on three grounds: (1) the district

court never properly decided whether, given the fifth amendment price, City Gas actually refused to deal under section 2; (2) the district court failed to determine whether, for purposes of sections 4 and 16 of the Clayton Act, Consolidated suffered any injury in fact as a result of City Gas' refusal; and (3) the absence of the fifth amendment price also infected the remedies fashioned by the district court.

I would thus instruct the district court on remand first to find the fifth amendment price, in the manner I describe above, second to decide whether City Gas breached its duty to deal under the district court's new rule, third to determine whether Consolidated suffered injury as a result of City Gas's refusal to deal, and fourth, to revisit the remedies issues. I now provide more particular instruction on these last two points.

1. Injury in Fact.

It is an established principle of law that *injuria absque damno*, or an injury without damage, creates no right to a remedy. *See Shumate & Co. v. National Ass'n of Secs. Dealers, Inc.*, 509 F.2d 147, 152 (5th Cir.1975) ("injury is the *sine qua non* for stating a cause of action"). Section 4 of the Clayton Act expressly incorporates this principle by creating a private suit for treble damages only for "any person who shall be *injured* in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15 (1988) (emphasis added); *see Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983); *Blue Shield v. McCready*, 457 U.S. 465, 476–78, 102 S.Ct. 2540, 2546–48, 73 L.Ed.2d 149 (1982); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977); *Cable Holdings, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1561–62 (11th Cir.1987); *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602, 607 (11th Cir.1984), *cert. denied*, 471 U.S.

1056, 105 S.Ct. 2120, 85 L.Ed.2d 484 (1985); *McClure v. Undersea Indus.*, 671 F.2d 1287, 1289 (11th Cir.1982). Similarly, section 16 of the Clayton Act, which authorizes private suits for injunctive relief, requires the private plaintiff to show a likelihood of injury. *See* 15 U.S.C. § 26; *Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 111–15, 107 S.Ct. 484, 490–91, 93 L.Ed.2d 427 (1986).

Because the district court failed to find the fifth amendment price, it did not properly decide whether Consolidated suffered injury. On remand, in order to prove injury in fact, Consolidated would have to show that it could have turned a profit after purchasing gas from City Gas at the fifth amendment price. If Consolidated can show that it could have turned a profit, that showing would prove that it suffered injury as a result of City Gas' refusal to deal. The showing would satisfy section 4's injury-in-fact requirement and would probably also demonstrate a likelihood of future injury for purposes of section 26 of the Clayton Act as well. If, on the other hand, Consolidated cannot show that it could have turned a profit, then City Gas' refusal to deal caused no injury: Consolidated would have gone out of business regardless of the refusal.[68] In that event, Consolidated would be unable to show that it suffered, or was likely to suffer, injury in fact and thus would be unable to make out a case under sections 4 or 26 of the Clayton Act. I next discuss the remedies issues.

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[68]Congress surely did not design the antitrust laws merely to prevent companies from going out of business where the defendant has done nothing to undercut that company's ability to compete. Nor did Congress provide for liquidated damages in the antitrust laws, and I sincerely doubt that Congress intended the antitrust laws to tie up a courtroom for months for the purpose of awarding nominal damages merely to punish a company such as City Gas for not selling gas at the fifth amendment price.

2. Available Remedies.

The availability of remedies in this case—assuming City Gas violated section 2—depends upon the assumption that Consolidated could have turned a profit with a supply of natural gas at the fifth amendment price. As I discuss above, injury is an element of liability under sections 4 and 16 of the Clayton Act. The principle of *injuria absque damno*, though, also implicates the availability of remedies. In the present case, therefore, if Consolidated could not have turned a profit with gas, then it is entitled to no remedy. As I also discuss above, the fifth amendment price controls this injury question as well. Consolidated's ability to turn a profit, and thus prove injury, depends upon the fifth amendment price. To the extent that the fifth amendment price changes, therefore, Consolidated's profitability, and the question of injury, will also change. With these principles in mind, I now turn to the specific remedies issues raised here. Depending upon whether or not Consolidated can operate in the future as a natural gas distributor, one of two remedial schemes, which I discuss in turn in subsections a and b, will provide relief. As I demonstrate in subsection c, however, the two schemes are inconsistent with one another. In subsection d, I then consider the district court's errors in granting Consolidated relief under both schemes and instruct it on how to proceed on remand.

a. The first remedial scheme.

In its amended complaint, Consolidated sought both permanent injunctive relief and damages for lost profits under the first remedial scheme. Consolidated's request for permanent injunctive relief implied that at the time of City Gas' refusal to deal, and at least until the date of the amended complaint, Consolidated could have turned a profit after purchasing wholesale gas at the fifth amendment price. The request for an injunction further implied that, based on Consolidated's ability to turn a profit in the past,

Consolidated could have turned a profit in the future if the district court granted the injunction and provided Consolidated with a supply of wholesale gas.[69] Consolidated thus requested damages for its lost profits from the date of City Gas' refusal to deal to the date of final judgment and a permanent injunction enabling Consolidated to operate in the future as retail natural gas distributor *with a supply of gas*. This combination of remedies would make Consolidated whole, with the damages compensating for any losses incurred before the injunction and the injunction enabling it to operate in the future as a company with a supply of natural gas.

In calculating Consolidated's damages for lost profits under this remedial scheme, a court must undertake the following inquiry: based on the fifth amendment price, the court must determine what Consolidated's profits would have been if it had a natural gas supply. Of course, if Consolidated could not have turned a profit, then it is not

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[69]Curiously, Consolidated did not request a preliminary injunction. If Consolidated's ability to operate as a natural gas supplier—and to do so at a profit—depended upon a hook-up to City Gas, then presumably Consolidated would have wanted a hook-up as soon as it could obtain one. Nevertheless, for reasons not apparent in the record, Consolidated decided not to request a preliminary injunction. Instead, it waited until trial to specify the remedy it was seeking. There, Consolidated claimed that City Gas, by refusing to supply wholesale gas, had in effect taken Consolidated's business. Consolidated therefore sought damages in the form of the going concern value of its business. Through its expert witness, Ben Ball, Consolidated asserted that City Gas had deprived it of twenty years of future profits. As it turned out, the district court awarded Consolidated its lost future profits (reduced to their present value) as well as a permanent injunction requiring City Gas to supply Consolidated with gas at a price to be set by the FPSC. The granting of injunctive relief was patently inconsistent with the damages award, an issue that I discuss below, *see infra* slip op. at 5211–5212, 5214, ____ – ____, ____

entitled to damages.[70] In addition, because the fifth amendment price is always subject to change, the court must determine whether the fifth amendment price remained fixed from the time of the refusal to deal until the time of final judgment. If the fifth amendment price changed, then the court must reassess whether Consolidated could have turned a profit at each interval of changing prices.

If the court decides to grant the injunction, and requires City Gas to supply gas at the fifth amendment price, the court must then retain jurisdiction over the case and entertain City Gas' motions to modify the injunction in light of any subsequent changed circumstances or to dismiss the case in the event that Consolidated can no longer turn a profit. As I discuss above, the fifth amendment price is subject to constant change, as are Consolidated's own costs. Thus, the court must retain jurisdiction over the case, not only to redetermine the fifth amendment price in light of successively changing circumstances, but also to redetermine whether Consolidated can still turn a profit at the modified fifth amendment price. If at any subsequent time Consolidated can no longer turn a profit at the fifth amendment price, then the court must vacate the injunction and dismiss the case.

This combination of damages for lost profits and injunctive relief would make Consolidated whole. The damages would compensate it for whatever loss it suffered as a result of the refusal to deal prior to the date of final judgment, and the injunction would enable it to operate in the future as a company with a natural gas supply.

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[70]If Consolidated cannot show past injury for purposes of the damages award, then Consolidated will probably also be unable to show a likelihood of future injury for purposes of injunctive relief. In a case such as this one, a plaintiff generally proves a likelihood of future injury based on a showing of past injury.

b. The second remedial scheme.

As I suggest above, the implication of Consolidated's request for injunctive relief was that Consolidated, which had been shut down for want of a natural gas supply, could resume operation if it acquired a natural gas supply. This outlook could change, of course, if, prior to trial, the effects of the refusal to deal put Consolidated permanently out of business, thus rendering injunctive relief useless. In that event, at trial, Consolidated would seek (1) damages for the net going concern value of the company, with gas, just prior to its demise and (2) damages in the amount of lost profits from the date of the refusal to deal to the date of its demise.[71]

The principle behind the damages for loss of Consolidated's going concern value is that City Gas' refusal to deal eventually resulted in Consolidated's demise, in effect a taking of its business (less the assets that Consolidated kept). That is, as a result of City Gas' continued refusal to deal, Consolidated could no longer operate as a natural gas distributor even if it had a supply of natural gas. The damages for loss of going concern value would therefore compensate Consolidated for the difference between what Consolidated would have been worth had City

[71]Conceivably, Consolidated could have lost a part of its going concern value prior to its total demise. Assume, for example, that Consolidated (as an LP gas distributor) serviced Whiteacre and Blackacre and that, soon after the refusal to deal, City Gas took control of Blackacre. At that point, which preceded its general demise, Consolidated lost the ability to go back into operation in Blackacre even if it could have acquired a supply of gas before its general demise. In that case, Consolidated would still seek damages for the company's going concern value just prior to the demise, as well as damages for profits lost prior to its demise; it would also seek damages for the going concern value of its operation in Blackacre—the portion of its operation that was lost before the demise. Of course, when the court determined the going concern value of Consolidated's *entire* operation just prior to the demise, that operation would no longer include Consolidated's operation in Blackacre. *Cf. infra* note 76 (discussing loss of partial going concern value in relation to injunctive relief).

Gas supplied gas and what it was worth without a supply of gas just prior to its demise.[72]

In calculating these damages, a court must undertake the following analysis: the court must first determine Consolidated's fair market value—or, what a hypothetical willing buyer, fully informed of all relevant facts, would pay a hypothetical willing seller, also fully informed of all relevant facts, for Consolidated—with gas as compared to without gas. Without a supply of gas, Consolidated would be worth the salvage value of its plant and equipment (its pipesystem), that is, what a hypothetical buyer would pay for the company without gas just prior to its demise—say, for the sake of discussion, $750,000. With a supply of gas, Consolidated would still not be worth any more than its salvage value *unless* it could have turned a profit with a supply of gas at the fifth amendment price. If Consolidated could have turned a profit with gas, then the court must determine the damages caused by the refusal to deal through the eyes of the hypothetical willing buyer and seller.

Assume that the court finds that the buyer and seller strike the following deal: after dickering about how long Consolidated can count on a supply of gas from City Gas and about how long Consolidated can turn a profit at City Gas' fifth amendment price, the buyer and seller reach a compromise on these points. The buyer then decides how much it is willing to invest in order to obtain Consolidated's profits over the established period of time.[73] The seller decides what amount it will accept, and the two reach another compromise. They conclude that Consolidated with

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[72]I assume that City Gas was Consolidated's only feasible gas supplier, i.e., that hooking up to FGT's pipeline was too expensive for Consolidated.

[73]In the dickering process, the buyer and seller assess the risk of the investment. The buyer emphasizes the possibility that Consolidated will generate profits only for a short term, taking into account the likelihood of changes in the fifth amendment price. Obviously, the more uncertain Consolidated's profit picture might be, the less the buyer is willing to pay.

a supply of gas will probably generate $250,000 in profits per year for twenty years.[74] Given the nature of the investment risks, the buyer expects a ten percent annual return on its investment and is thus willing to pay approximately $2,128,500, or the present value of annual profits of $250,000 over a period of twenty years. The buyer will in effect purchase a twenty-year annuity that pays $250,000 a year. The court thus finds that Consolidated's loss of going concern value is $1,353,500—the difference between $2,128,500 (Consolidated's fair market value with gas) and $775,000 (Consolidated's fair market value without gas).

Consolidated also seeks damages for the profits it lost while in operation after City Gas' refusal to deal until the time of its demise.[75] The court must determine those damages based on the profits that Consolidated would have made if it had purchased gas at City Gas' fifth amendment price. *See supra* slip op. at 5208, ____. The district court must also take into account any changes in the fifth amendment price during that period of operation.

c. The two schemes' inconsistency.

As this discussion indicates, these two remedial schemes are theoretically inconsistent. As I explain above, Consolidated can recover damages for loss of its going concern value if, by the time of trial, it can no longer operate

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[74]For the sake of discussion, I assume that $250,000 in annual profits represents Consolidated's net operating profits: gross revenues less gas delivery costs with no reserve for depreciation. I also assume that Consolidated's fixed assets—its plant and equipment—are self-consuming and will be worthless at the end of twenty years.

[75]In the unlikely event that the demise occurred the moment of City Gas' refusal, and Consolidated could still show that it could have turned a profit had City Gas not refused to deal, then Consolidated obviously cannot seek damages for lost profits in the past: the damages for loss of future profits will be calculated as of the moment of the refusal and will thus include all profits that Consolidated could have generated had the refusal not occurred.

as a natural gas distributor. Under that measure of damages, City Gas in effect pays Consolidated the present value of the profits that Consolidated would have made in the future ($250,000 for twenty years in my hypothetical example) had City Gas sold it gas. In contrast, if, having acquired a supply of gas, Consolidated can operate in the future as a natural gas distributor, then it will seek an injunction. Thus, the permanent injunction means that Consolidated *can* operate as a natural gas distributor, whereas the award of damages for loss of going concern value means that Consolidated *cannot* operate as a natural gas distributor. If Consolidated can continue to operate, the court orders City Gas to supply wholesale gas to Consolidated. If Consolidated cannot continue to operate, however, the court does not order City Gas to supply the gas but instead awards Consolidated damages equivalent to the present value of the profits that it would have made had City Gas supplied it with gas.

Now, if the court awards Consolidated *both* an injunction *and* damages for loss of its going concern value (i.e., the present value of the profits that Consolidated would have made had City Gas supplied it with gas), not only are the remedies theoretically inconsistent—the injunction implying that Consolidated can continue to operate as a natural gas distributor, and the damages implying that Consolidated cannot continue to operate as a distributor—but the award also provides Consolidated with a double recovery. That is, Consolidated recovers its future profits twice: once in the form of the damages equivalent to the present value of twenty-years worth of profits, and again in the form of the profits that it generates over the same twenty years by operating its business.[76]

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[76] These two remedial schemes would be consistent and would not involve a double recovery in a case where a company permanently loses part of its assets as a result of a refusal to deal but retains enough of its assets to continue operating once it gains access to the needed resource. Assume, for example, that Company A operated in Whiteacre and

(Footnote continued on next page)

With these remedial models, and the inconsistencies between them, in mind, I now consider what the district court actually did in the present case and provide instruction on how it would proceed assuming the case were remanded.

d. Remedies granted below and instructions for remand.

The district court below improperly applied the first remedial model. The district court awarded damages for lost profits in the amount of $83,090.15, which covered the period of time from the refusal to deal[7] until the date of trial. The district court, however, did not arrive at this figure by calculating what Consolidated's profits during that time

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(Footnote continued from previous page)

Blackacre and had an opportunity to expand into Beyondacre. As a result of Company B's refusal to sell resource X to Company A (which would constitute a violation of section 2 under the district court's new rule, even though Company B has never sold resource X to other companies), Company A can no longer operate in Blackacre and has lost forever the opportunity to expand into Beyondacre; Company A's operation, although still profitable, is now limited to Whiteacre. Thus, the court grants an injunction ordering Company B to deal, which allows Company A to continue its operation in Whiteacre, and the court also awards damages for lost profits between the time of Company B's refusal to deal and the final judgment in the case. In addition, the court awards Company A the fair market value of its operation in Blackacre and its opportunity to expand into Beyondacre (these business opportunities having been lost forever). If the court, in doing so, made the necessary factual findings—such as what the fifth amendment price was for resource X, whether Company A could turn a profit given that fifth amendment price, and what the degree of uncertainty concerning Company A's profitability was—these remedies would be proper.

[7]The district court below found that City Gas refused to deal as of February 20, 1982—the date when City Gas' board of directors met and first considered acquiring Consolidated. In my view, that finding is clearly erroneous. The refusal could not have occurred until City Gas and Consolidated entered into negotiations and City Gas refused to deal at the fifth amendment price.

would have been, based on the fifth amendment price, with a natural gas supply. Rather, the district court reached this figure based on the profits that *City Gas* made in servicing Consolidated's former customers. The district court determined City Gas' net profits by subtracting City Gas' wholesale gas costs from City Gas' gross revenues. 665 F.Supp. at 1515. As I show above, however, *City Gas'* profit picture has no relevance to what Consolidated's profit picture would have been. *See supra* slip op. at 5201–5205, ____ - ____. City Gas' wholesale cost—the cost of gas from FGT—has no relation to the fifth amendment price that Consolidated would have paid for wholesale gas from City Gas. The district court, therefore, improperly calculated this damages figure. On remand, I would instruct the district court instead to award damages based on a showing by Consolidated of what its profits would have been had it purchased gas from City Gas at the fifth amendment price.

The district court similarly erred in fashioning the injunction in this case. Assuming that on remand Consolidated could show the likelihood of future injury, *see supra* slip op. at 5206–5207, ____ - ____, the district court, under its new rule of liability, should grant an injunction ordering City Gas to supply wholesale gas to Consolidated. The injunction, though, may require City Gas to supply gas only *at the fifth amendment price*. Because, in the proceedings below, the district court never set the fifth amendment price, it could include no price term in its injunction and, as a result, delegated the price-setting task to the FPSC, *see* 665 F.Supp. at 1512, 1534, 1545.[78] On

[78]In improperly directing the parties to repair to the FPSC for a determination of the wholesale price, the district court in the present case implied that the FPSC's price would, without further consideration by the district court, operate as a provision (the price term) of the injunction. The district court apparently gave no thought to what should happen if the FPSC's price did not satisfy the fifth amendment. That is, the district court did not retain jurisdiction to review the FPSC's price in the event that the price failed to provide City Gas with just compensation.

remand, the district court would have to include the fifth amendment price term in the injunction. In addition, the district court would have to retain jurisdiction over the case (which it did not do below), entertaining any motions made by City Gas to modify the injunction in light of changed circumstances or to dismiss the case if Consolidated can no longer turn a profit.

The district court also awarded damages for the loss of Consolidated's going concern value in the amount of $1,503,975. I first consider the district court's error in calculating this figure without having found a fifth amendment price. I then discuss the inconsistency of its decision to award these damages as well as to grant an injunction.

The court awarded damages for loss of going concern value in the amount of $1,503,975 based on testimony by Consolidated's expert witness, Ben Ball. Consolidated called Ball to the stand to render an opinion concerning Consolidated's present value as a company with a natural gas supply—in effect, what a hypothetical willing buyer, fully informed of all relevant facts, would pay a hypothetical willing seller, also fully informed of all relevant facts. In formulating his opinion, Ball assumed that Consolidated could indefinitely obtain a "competitively priced source of natural gas," 665 F.Supp. at 1514, and then forecast that, with this supply of gas, Consolidated could continue to operate profitably for twenty years. He estimated the company's annual profits for that period, including the profits that Consolidated would have made by servicing former customers that were now lost to City Gas. From those combined profits, he deducted the expenses that Consolidated would have incurred in changing from LP gas distribution to natural gas distribution and in hooking up to City Gas' pipesystem. Ball then opined that the hypothetical buyer would expect a ten-percent return on his investment, and, using that rate, he reduced the annual net profits

during the twenty years to their present value. He concluded that Consolidated's "value today as a natural gas firm," 665 F.Supp. at 1515, was $2,275,130.

From that figure, Ball subtracted $771,155—the salvage value of Consolidated's assets without gas. Ball arrived at that figure based on the price that City Gas offered to pay Consolidated for all its assets, in the course of their negotiations regarding the wholesale gas supply. As Ball suggested, that figure represented the salvage value of Consolidated's assets as a company without a natural gas supply—the assets that Consolidated still possessed. After subtracting this figure, Ball was left with a figure of $1,503,975, which represented "[t]he diminution of Consolidated's value as a natural gas company as a result of City Gas' actions," *id.* at 1515, that is, the present value of the profits that Consolidated would have made over the next twenty years if City Gas had not refused to deal, less Consolidated's present salvage value.

The district court erred, however, in relying on Ball's profit figures to the extent that those figures were not based on the fifth amendment price. Although this error did not infect Ball's calculation of Consolidated's without-gas value (i.e., its salvage value), the error did infect his calculation of Consolidated's with-gas value (i.e., the present value of a twenty-year stream of profits). Rather than basing his figures on the fifth amendment price, Ball considered a "competitively priced source of natural gas." As I discuss in detail above, however, no "competitively priced source of gas" existed. *See supra* notes 60, 61, & accompanying text. Presumably, Ball based his figure on FGT's price to City Gas, which has no relevance to the fifth amendment price here. *See id.* In addition, rather than determining what Consolidated's rates would have been if Consolidated bought gas at City Gas' fifth amendment price, Ball looked to "City Gas' rates" to its customers. As I also discuss above, City Gas' rates were irrelevant to Consolidated's rate structure.

See id. For these reasons, Ball's figures provided no support for the damages award; the district court,[7] therefore, improperly relied on those figures in calculating the damages award. On remand, the district court would have to recalculate the award in a manner consistent with the fifth amendment.

As a more serious problem, this award of damages for loss of Consolidated's going concern value is inconsistent with permanent injunctive relief and gives Consolidated a double recovery.[79] As I discuss above, *see supra* slip op. at 5211–5212, ____ - ____, the remedies are theoretically inconsistent: the permanent injunction implies that Consolidated can operate (for twenty years) as a profitable natural gas company whereas the damages award (in the form of the present value of a twenty-year stream of profits) implies that Consolidated can no longer operate as a natural gas company. Consolidated either can operate as a gas company or it cannot operate as such; it cannot, however, do both. Depending on which course Consolidated elects, it will be entitled either to an injunction or to damages for loss of going concern value; it cannot, however, receive both.

To award Consolidated both remedies, moreover, constitutes a double recovery. After compensating Consolidated for the loss of its going concern value by awarding it the present value of the profits that it would have made over the next twenty years as a gas company, a permanent injunction then in effect duplicates the award. The injunction gives Consolidated gas for the next twenty years and thus the profits that the damages award assumed Consolidated would have made during that time had City

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[79]Ball's testimony assumed an entire taking of Consolidated's business as a company with gas. Thus, the record provided no basis for treating this case as a partial-taking situation, *see supra* notes 71 & 76, in which damages for loss of going concern value might be consistent with injunctive relief.

Gas not refused to deal.[80] Armed with the injunction, Consolidated can sell its "going concern" for the same present-value price reflected in the going concern damages award. Consolidated thus earns twenty-years worth of profits *twice*. Under the district court's decision, therefore, Consolidated has obviously received a double recovery. On remand, Consolidated would have to elect between remedies.

In addition, if, on remand, Consolidated were to elect damages for loss of going concern value, then the district court would have to find the date of Consolidated's demise and begin its damages calculation as of that date. Based on that date as well, the district court would have to determine whether Consolidated should recover any damages for lost profits prior to the date of its demise. The expert on whose figures the district court relied indicated that he had calculated "Consolidated's value *today* as a natural gas firm." *Id.* at 1515 (emphasis added). The district court, however, did not specify which date "today" was— whether it was the date of the refusal, the date of Consolidated's amended complaint, the date of trial, or some other interim date. That date, of course, must be the date of Consolidated's demise—the point in time at which Consolidated's continued operation as a natural gas company became impracticable. The district court would have to calculate the damages for loss of going concern value (in the form of the present-day value of twenty-years' worth of future profits) as of that point forward and would have to

[80] In awarding Consolidated damages in the form of the present-day value of the profits that it would have made over the next twenty years, the district court found—albeit implicitly (by accepting Ben Ball's testimony)—that City Gas would have supplied gas for that period at a "competitive price." If Ball's testimony supported the finding that, with a supply of gas from City Gas, Consolidated could have operated profitably for twenty years, then that testimony certainly supported, with equal force, the district court's conclusion (implicit in its award of permanent injunctive relief) that an injunction would enable Consolidated to operate profitably for twenty years.

calculate the damages for lost profits from that point backward to the date of the refusal to deal.

The district court, however, never explicitly decided whether or not Consolidated's business was ruined—let alone when its demise might have occurred. Instead, the district court implied that Consolidated both died and stayed alive. On remand, the district court would have to address this problem. First, it would have to require Consolidated to elect between these two remedial schemes. Depending on its ability to operate in the future, Consolidated could elect *either* injunctive relief, with damages for profits lost in the past, or it may elect damages for loss of going concern value, with damages for profits lost in the past. In either case, however, the district court's award of damages for lost profits in the amount of $83,090.15, which covered the period of time from the refusal until the date of trial, would not be a proper award: the district court did not base the award on the fifth amendment price and never properly determined the dates of the refusal, *see supra* note 77, or of Consolidated's demise.

Thus, even if today's court upholds the impossible rule fashioned by the district court, the district court has still failed to apply it properly in the present case. For that reason, I would vacate the district court's decision and remand for further proceedings as I describe.

VII. STATE-ACTION IMMUNITY

Even if City Gas could be held to have violated section 2, which in my view it has not violated, City Gas would still be immune from federal antitrust liability under the state-action immunity doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L. Ed. 315 (1943). I first discuss the *Parker* doctrine's application to private parties. I then analyze City Gas' conduct—both its territorial agreement with Peoples Gas and its refusal to deal with Consolidated (neither of

which, as I have shown, would provide grounds for liability anyway)—under this doctrine.

A. *The* Midcal *Test.*

The district court correctly stated that in a case such as the present one, when a private party claims immunity under the state-action immunity doctrine, the party must satisfy both parts of the test articulated by the Supreme Court in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*:[31] "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (opinion of Brennan, J.)). I discuss what these two prongs require in turn.

1. The Clearly Articulated Prong.

In *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985), the Supreme Court considered the first prong of this test. In that case, the United States brought an antitrust challenge against the collective ratemaking practices of rate bureaus composed of motor common carriers in the southeast. Under procedures authorized, but not compelled, by the states in which the carriers operated, the rate bureaus submitted joint rate proposals to the public service commission in each state. *Id.* at 50, 105 S.Ct. at 1723. The Supreme Court held that *Midcal's* first prong did not require the state to compel the challenged conduct: "The federal antitrust laws do not forbid the States to adopt policies that permit, but do not

[31]Municipalities, unlike private parties, must satisfy only the first *Midcal* requirement in order to have *Parker* immunity. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46–47, 105 S.Ct. 1713, 1720, 85 L.Ed.2d 24 (1985).

compel, anticompetitive conduct by *regulated* private parties." *Id.* at 60, 105 S.Ct. at 1728 (emphasis original).

The Court then considered whether the first prong would be satisfied "in the absence of a statute expressly permitting the challenged conduct." *Id.* at 63, 105 S.Ct. at 1730. In *Southern Motor Carriers*, statutes in North Carolina, Georgia, and Tennessee explicitly permitted collective ratemaking; the Mississippi motor carrier statute, however, did not expressly permit such ratemaking, *see* Miss.Code Ann. § 77-7-1 *et seq.* (1972 & Supp.1984). Rather, that statute authorized the public service commission to prescribe "just and reasonable" rates for intrastate transportation but left the details of the rate-setting process to the commission itself. The Supreme Court held that the statute satisfied *Midcal's* clearly articulated requirement. The Court reasoned that the statute clearly indicated the legislature's intent that the commission, rather than the market, would set intrastate rates. The legislature left the details of that process to the commission, and the commission exercised its authority by encouraging collective ratemaking. The Court concluded,

> A private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct. *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. [389] at 415, 98 S.Ct. [1123] at 1138 (opinion of BRENNAN, J.). As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied.

471 U.S. at 64, 105 S.Ct. at 1730.

The application of the first *Midcal* requirement to conduct by private parties under *Southern Motor Carriers* thus parallels the requirement's application to conduct by municipalities under *Town of Hallie v. City of Eau Claire*,

471 U.S. 34, 42–44, 105 S.Ct. 1713, 1718–19, 85 L.Ed.2d 24 (1985), a case handed down the same day as *Southern Motor Carriers*. In *Town of Hallie*, a township challenged a city's conduct in gaining a monopoly over sewage treatment and tying its provision of sewage collection services to its treatment services. The city claimed immunity under *Parker* based on a state statute, which granted the city authority to develop sewage systems and to " 'describe with reasonable particularity the district to be [served].' " *Id.* at 41, 105 S.Ct. at 1717 (quoting Wis.Stat. § 62.18(1) (1981–1982)). The Court considered whether that statute satisfied the requirement of a clearly articulated state policy. The Court applied a foreseeability test: it observed that "the statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas." *Id.* at 42, 105 S.Ct. at 1718. The court then stated that "[i]t is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." *Id.*, 105 S.Ct. at 1718. Citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415, 98 S.Ct. 1123, 1138, 55 L.Ed.2d 364 (1978) (opinion of Brennan, J.), the Court held that "it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served." 471 U.S. at 42, 105 S.Ct. at 1718 (same passage cited in *Southern Motor Carriers* holding, *see supra* slip op. at 5216, ____). In the Court's view, the statutes plainly showed that " 'the legislature contemplated the kind of action complained of' "—a showing that was "sufficient to satisfy the 'clear articulation' . . . test." *Id.* at 44, 105 S.Ct. at 1719 (quoting *Lafayette*, 435 U.S. at 415, 98 S.Ct. at 1138).

Both *Southern Motor Carriers* and *Hallie* thus derive from the Court's earlier pronouncements in *Lafayette* and stand for the proposition that, under the first *Midcal* requirement, a state legislature need not *expressly* permit (and clearly need not compel) the conduct at issue; rather, if

the legislature, by displacing competition in a given field with a broad regulatory structure, has contemplated that such conduct might occur, that will satisfy the "clearly articulated" requirement. *See also Executive Town & Country Servs. v. City of Atlanta*, 789 F.2d 1523, 1529 (11th Cir. 1986). Of course, as the Supreme Court stated in *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55, 102 S.Ct. 835, 843, 70 L.Ed.2d 810 (1982), the requirement "is not satisfied when the State's position is one of mere *neutrality* respecting the . . . actions challenged as anticompetitive." Thus, when the Constitution of Colorado granted cities "the full right of self-government in both local and municipal matters," *id.* at 43 n. 1, 102 S.Ct. at 837 n. 1, the Court held that the provision did not clearly articulate a state policy to displace competition with regulation in the cable television industry: the constitutional provision had nothing at all to do with cable television regulation. *Id.* at 55, 102 S.Ct. at 843; *see also Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810, 825 (11th Cir.) (legislature must have foreseen specific *type* of anticompetitive conduct alleged in case), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1960, 109 L.Ed.2d 322 (1990).

2. The Active Supervision Prong.

Midcal's second requirement of active supervision, as the Court explained in *Hallie*, reflects the concern that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Hallie*, 471 U.S. at 47, 105 S.Ct. at 1720. The active supervision requirement is thus "designed to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 100–01, 108 S.Ct. 1658, 1663, 100 L.Ed.2d 83 (1988). The crux of active supervision, as the Court stated in *Patrick*, is "that the State exercise ultimate

control over the challenged anticompetitive conduct." *Id.*, 108 S.Ct. at 1663. The state must therefore "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.*, 108 S.Ct. at 1663.

Applying this formula in *Patrick*, the Court held that a state did not actively supervise a physician peer-review process. Although the state had mandated the peer-review process in the first place, that state lacked ultimate authority over the peer-review committee's actual decisions: neither the state nor any of its administrative bodies reviewed specific decisions or had authority to overturn decisions not in accordance with state policy. *See id.* at 102–04, 108 S.Ct. at 1664.[32] The Court, therefore, held that no state actor actively supervised the peer-review process and that the federal antitrust laws applied. *Id.* at 104–05, 108 S.Ct. at 1665; *see also Shahawy v. Harrison*, 875 F.2d 1529, 1535–36 (11th Cir.1989) (applying *Patrick* to public hospital peer-review procedure).

Similarly, in *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987), the Supreme Court held that New York State's liquor-pricing scheme did not satisfy *Midcal's* active supervision prong. That scheme, which did satisfy *Midcal's* clear articulation prong, required liquor wholesalers to post a wholesale bottle price and then prohibited retailers from selling at less than 112% of that posted price. In effect, though, the scheme allowed wholesalers to set retail prices. Although the retail price was based on the posted *bottle* price, wholesalers generally sold

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[32]Because the state courts conducted no review of specific committee decisions, the *Patrick* court found it unnecessary to decide "the broad question whether judicial review of private conduct ever can constitute active supervision." 486 U.S. at 104, 108 S.Ct. at 1664–65; *see also Pinhas v. Summit Health, Ltd*, 894 F.2d 1024, 1030 (9th Cir.1989) (also avoiding that question), *cert. granted*, ___ U.S. ___, 110 S.Ct. 3212, 110 L.Ed.2d 660 (1990). I consider this question below, as it applies to this case. *See infra* slip op. at 5225, ___.

liquor to retailers at a lower, posted *case* price. In addition, the retail price was based on the *current* posted bottle price; the wholesalers could thus sell at a low posted price and then increase the posted price in order to allow retailers to sell at a higher price. *See id.* at 342–46 & n. 6, 107 S.Ct. at 725–26 & n. 6. As a result, the Court found that the state did not actually set prices, did not review the reasonableness of established prices, and did not generally monitor the market or reexamine the pricing program. *See id.* at 345–46, 107 S.Ct. at 726. The Court therefore held that the state did not actively supervise the pricing system.[83]

As these two cases hold, then, the state must possess ultimate authority over the regulatory scheme at issue. The state must also exercise this authority to ensure that the scheme works as the state intended it to work. If the scheme breaks down and allows private parties to act however they want, then under *324 Liquor, Midcal's* active supervision requirement would not be satisfied: the state must exercise its authority by disapproving "particular anticompetitive acts . . . that fail to accord with state policy." *Patrick*, 486 U.S. at 101, 108 S.Ct. at 1663. Of course, if the scheme operates effectively, automatically requiring private actors to act in accord with state policy, the state would have nothing to disapprove, and the active supervision prong would be satisfied. *See 324 Liquor*, 479 U.S. at 344 n. 6, 107 S.Ct. at 725 n. 6.

I now apply the *Midcal* test to the present case, considering in turn City Gas' territorial agreement and its refusal to deal.

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[83]The Court did suggest that a simple "minimum markup" statute, which required retailers to charge 112% of their *actual* wholesale cost, might satisfy *Midcal's* second prong. *See* 479 U.S. at 344 n. 6, 107 S.Ct. at 725 n. 6.

B. *Applying* Midcal.

1. The Territorial Agreement.

As I discuss above, City Gas' territorial agreement with Peoples Gas provided no basis for antitrust liability in the present case. Nevertheless, assuming for the sake of discussion that the agreement might provide a basis for liability, City Gas is still immune under the state action doctrine.

a. Clearly articulated state policy.

City Gas' territorial agreement is protected pursuant to a clearly articulated state policy. That policy is expressed in Chapter 366 of the Florida Statutes, Fla.Stat. ch. 366 (1987),[84] which prescribes the duties of the utility companies in Florida and charges the FPSC with administrative responsibility. Chapter 25–7 of the Florida Administrative Code contains regulations promulgated by the FPSC for gas utilities. *See* 1986 Fla.Admin.Code Ann. ch. 25–7 (FPSC regulations promulgated under chapter 366).

The court today adopts the district court's conclusion that these provisions did not satisfy *Midcal's* clearly articulated requirement. The district court based its conclusion on the fact that chapter 366 expressly grants the FPSC power to approve territorial agreements involving electric utilities, and that other chapters do the same with respect to telephone, water, and sewage utilities, but that the legislature failed expressly to grant this power to the FPSC with respect to natural gas utilities. In the district court's view, that omission clearly indicates that the legislature did not intend to authorize the FPSC to approve territorial

[84]This chapter has been amended by 1989 Fla. Laws ch. 89–292, to authorize expressly the FPSC to approve territorial agreements and resolve territorial disputes between natural gas utilities. I consider below the amendment's effect on the present case, *see infra* note 86.

agreements between natural gas utilities. Given this clear indication, the district court was not persuaded otherwise by the Florida Supreme Court's opinion in *City Gas Co. v. Peoples Gas Sys., Inc.*, 182 So.2d 429, 436 (Fla.1965), which addressed the very territorial agreement at issue here and held that chapter 366 implicitly grants the FPSC authority to approve such agreements.

I disagree with the district court's interpretation of the legislative intent behind chapter 366. That interpretation overemphasized the absence of an express grant of power to approve territorial agreements between natural gas utilities and, as a result, reached a conclusion that was inconsistent with the general structure of the regulatory scheme created by chapter 366 for the natural gas industry and with the role of the FPSC within that scheme. The scheme that the legislature has created in effect requires the FPSC to approve territorial agreements in exercising its prescribed ratemaking functions. Given the nature of this scheme, therefore, if the legislature had intended that the FPSC not approve such agreements, then it would have had to include a provision expressly prohibiting the FPSC from doing so and also explaining how the FPSC could accomplish its statutorily mandated ratemaking responsibility without that power.[85] In my view, chapter 366 and the regulatory scheme that it creates clearly demonstrate the legislature's intent "to displace competition in [the natural gas] field with a regulatory structure," *Southern Motor Carriers*, 471 U.S. at 64, 105 S.Ct. at 1730. Under the Supreme Court's decision in *Southern Motor Carriers*, that intent satisfies the first prong of the *Midcal* test. *See id.*, 105 S.Ct. at 1730. I first review chapter 366 to determine the kind of regulatory scheme that

[85]Indeed, once the panel's decision in this case adopted this inconsistent position, the Florida legislature in effect overruled it by adding language that expressly authorizes the FPSC to approve territorial agreements and resolve territorial disputes between natural gas utilities. The legislature thus made explicit what, as I have observed, was already implicit in the old provision.

it creates and the FPSC's role within that scheme. I then consider the inconsistency of the district court's interpretation with this scheme.

In chapter 366, the state empowers, as "an exercise of the police power of the state," the FPSC to regulate public utilities. Fla.Stat. § 366.01. Section 366.03 addresses the general duties of public utilities: "Each public utility shall furnish to each person applying therefore reasonably sufficient, adequate, and efficient service upon terms as required by the commission." Section 366.04 then describes the duties of the FPSC: "the commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service and the issuance and sale of its securities." Thus, section 366.05 provides that the FPSC "shall have power to prescribe fair and reasonable rates and charges . . . to be observed by each public utility." The FPSC fixes these rates based on the factors described in section 366.041:

> In fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all public utilities under its jurisdiction, the commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public; the ability of the utility to improve such service and facilities; and energy conservation and the efficient use of alternative energy resources; provided that no public utility shall be denied a reasonable rate of return upon its rate base in any order entered pursuant to such proceedings.

The FPSC further addresses the rate-fixing process in its regulations under chapter 366. Section 25–7.033(2) of the regulations requires each utility to "file with the Commission tariffs containing schedules for all rates and

charges." Section 25–7.033(3) then states that no "schedules of rates or charges, or modifications or revisions of the same, shall be effective until filed with and approved by the Commission as provided by law." In addition, the FPSC has established procedures to monitor existing rates to ensure that they are fair and just and provide a reasonable rate of return as specified in section 366.041 of the Florida Public Utilities statute. Sections 366.07 through 366.072 also provide procedures for rate adjustments.

In addition to its rate-setting function, the FPSC's powers reach the utilities' general assets. As section 366.05 provides: "the commission shall have power to . . . require repairs, improvements, *additions, and extensions* to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto." (Emphasis added.) Under section 366.04, the FPSC also has jurisdiction "to regulate and supervise each public utility with respect to . . . the issuance and sale of its securities."

Chapter 366 thus establishes a full-scale regulatory structure and grants the FPSC broad regulatory and supervisory powers within that structure. Not only does the FPSC fix utilities' rates—a process that engages the FPSC in an in-depth and continuous review of virtually every aspect of the utilities' operation—but the FPSC also has direct supervisory power with respect to the utilities' use of their own assets. The FPSC has jurisdiction to regulate utilities' stock issuances, to require repairs to the utilities' facilities, and also to mandate additions and extensions of those facilities—undertakings that would substantially affect utilities' assets.

True, the statute does not explicitly grant the FPSC power to approve territorial agreements and resolve territorial disputes between natural gas companies, whereas the statute does grant such powers with respect to electric

utilities. In light of the powers the statute does expressly grant to the FPSC, however, and the general regulatory structure that the statute creates, I find this omission to be insignificant. The Florida legislature clearly intended to displace competition in the natural gas industry with a system of regulation. As my review of this regulatory structure shows, moreover, the nature of a utility's operating territory—its size, the density of consumers, the degree of competition with other companies—is a crucial factor in the rate-fixing process. In order to provide the utility with a "reasonable rate of return"—the standard applied under the statute—the FPSC will obviously consider the utility's distribution area and the degree of competition in that area. The size of a utility's operating area will affect its cost structure: a larger area might increase the utility's fixed and operating costs; it might also require a greater investment in equipment and in a gas supply; in turn, however, the larger area might enable the utility to sell a larger volume of gas, thus generating higher gross revenues and perhaps more operating capital. As I discuss in detail in part VI, the degree of competition with other gas companies will also significantly affect the utility's cost structure: a company must invest resources in order to compete, an investment that increases the utility's costs. That investment in competition, moreover, might affect the general structure of the utility's assets. If the FPSC does not allow the utility to recover those costs through a rate increase, then the utility must cover them from its own assets, which might in turn force the utility to cut corners on safety or on research and development of alternative energy sources or which might simply force the utility out of business—concerns that obviously fall directly within the FPSC's jurisdiction.

As this discussion indicates, the utility's operating territory is of central concern to the FPSC's regulatory function and undeniably falls within the FPSC's purview: the nature of the utility's territory directly influences the rates set for consumers. To think, therefore, that the Florida

legislature did not intend the FPSC to approve territorial agreements—whether or not the legislature explicitly authorized such approval—is utterly inconsistent with the overall structure of the regulatory scheme that the Florida legislature did impose and the powers that it expressly granted to the FPSC. Given the nature of this scheme as actually created, had the legislature intended the FPSC not to approve such agreements, the legislature would have had to add a provision expressly prohibiting the FPSC from doing so and also explaining how the FPSC could accomplish its statutorily mandated ratemaking functions without that power. Under *Southern Motor Carriers*, this comprehensive regulatory scheme satisfies the first prong of the *Midcal* test.[86]

b. Active supervision prong.

As my review of chapter 366's regulatory scheme also demonstrates, the FPSC exercises "ultimate control" over the territorial agreement. The FPSC "ha[s] and exercise[s] power to review [territorial agreements between natural gas utilities] and disapprove those that fail to accord with state policy." *Patrick*, 486 U.S. at 101, 108 S.Ct. at 1663. Under *Patrick*, therefore, *Midcal's* second prong is satisfied as well.

The panel, in holding that the active supervision requirement was not satisfied, pointed to language in a decision by the FPSC and characterized it as an "expression of doubt . . . as to its authority to establish exclusive territories or to resolve territorial disputes between natural gas utilities." 880 F.2d at 303 (citing *In re: Tariff filed by*

[86]This conclusion finds support in the Florida Supreme Court's holding in the *Peoples Gas* case that chapter 366 implicitly grants the FPSC power to approve territorial agreements. As the panel noted, 880 F.2d at 302–01, although that decision is not dispositive of this inquiry, it is relevant.

Miller Gas, 85 FPSC 10:205, at 5–6 (Oct. 18, 1985)).[87] The panel then noted that the FPSC approved the specific territorial agreement at issue here, but, in a confusing passage, the panel seemed to conclude that, "[s]imply because the Commission has on occasion, some 15 to 25 years ago, looked at this agreement does not automatically immunize it from federal antitrust scrutiny." *Id.* at 303. That isolated review, in the panel's opinion, was not sufficient. The panel also summarily rejected the argument that the Florida Supreme Court's review of the agreement in *Peoples Gas* satisfied the active supervision prong.

The panel's approach, in my view, is improper in that it failed to consider the regulatory and supervisory functions that the FPSC exercises in its continuous rate-fixing process. That process, I suggest, satisfies the active supervision requirement. As I describe above, the FPSC continually takes account of existing territorial allocations in the course of setting rates. The FPSC sets rates that will provide the utility with a reasonable rate of return *given existing territorial allocations*. To the extent that the FPSC sets rates that allow the utility to continue to operate (that is,

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[87]The district court quoted the relevant passage from the FPSC's decision:

> It is not clear that this Commission has the statutory authority to either establish exclusive service territories for natural gas utilities (as it does for telephone, water and sewer utilities) or resolve territorial disputes between natural gas utilities (as specifically authorized for electric utilities). However, our resolution of this question is not necessary in view of our [other] finding. . . .

665 F.Supp. at 1530. This "expression of doubt" is clearly dictum. Whatever doubt the FPSC might have *expressed*, moreover, has not effected the FPSC's *actions* in approving territorial agreements, as I discuss. Also, that expression of doubt has nothing to do with the active supervision issue; rather, the expression merely comments on whether the state has clear articulated a policy in favor of territorial agreements. As I show above, the state has indeed done so—regardless of whatever doubt the FPSC (an agency without judicial authority to interpret legislative intent) may have expressed.

operate at a profit), the FPSC necessarily approves the existing territorial allocation. The FPSC, moreover, continually reviews the utility's rates: under § 25–7.024 of the FPSC's regulations, the gas utility must file a rate of return report for every month, based on which the FPSC continually monitors the utility's rates and, necessarily, its territorial allocation. In addition, if the FPSC disapproves of such an allocation, it has ultimate authority to mandate the utility to alter its distribution area "when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto." Fla. Stat. § 366.05(1). In choosing not to exercise that authority—and it has chosen not to do so in the present case—the FPSC thus implicitly approves the existing territorial allocation.

This is not a case, moreover, like *324 Liquor* where the state establishes a regulatory scheme that merely enforces private arrangements. Rather, the FPSC assumes a very active role under this regulatory scheme, initially approving the utility's proposed rates, and, in doing so, undertaking an investigation and consideration of a variety of factors as mandated in chapter 366. *See id.* §§ 366.041, 366.06. Nor is this a case like *Patrick*, where the state supervises a peer-review committee's general procedures but does not review the committee's specific, substantive decisions. Here, the FPSC does more than prescribe general procedures for filing rates; it actually conducts the rate-fixing process itself, setting initial rates and continually monitoring them.

In this case, furthermore, the Florida Supreme Court has directly reviewed the territorial agreement at issue. Although the Supreme Court has not yet had occasion to decide the question whether such review satisfies the active supervision requirement, *see Patrick*, 486 U.S. at 102–05, 108 S.Ct. at 1664–65 (state courts conducted insufficient review of specific committee decisions, thus not necessary to decide broad question whether such review could ever satisfy

active supervision requirement); *see also Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1030 (9th Cir.1989) (same), *cert. granted*, ____ U.S. ____, 110 S.Ct. 3212, 110 L.Ed.2d 660 (1990), the Florida courts' review of the agreement here is, in my view, sufficient to satisfy the active supervision requirement. In *Peoples Gas*, the Florida Supreme Court carefully considered City Gas' territorial agreement with Peoples Gas and approved that agreement under chapter 366. *See* 182 So.2d at 436. Unlike the judicial review conducted by the courts in *Patrick*, *see supra* note 82, which merely considered the procedures through which the peer-review committee's decision was reached but not the decision's merits, the Florida Supreme Court specifically reviewed the territorial agreement itself and approved it as consistent with state policy. That review, in my view, constituted active supervision.[83]

Thus, based on both the Florida Supreme Court's decision in *Peoples Gas* and on the FPSC's supervisory powers in the rate-fixing process, the active supervision prong is satisfied. Under *Midcal*, therefore, City Gas is immune from antitrust liability on the basis of its territorial agreement with Peoples Gas.

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[83]As the Supreme Court has made clear, a state court's determination that conduct is consistent with some state law does not necessarily insulate that conduct from federal antitrust law. *See Parker*, 317 U.S. at 351, 63 S.Ct. at 314 (citing *Northern Sec. Co. v. United States*, 193 U.S. 197, 344–47, 24 S.Ct. 436, 459–61, 48 L.Ed. 679 (1904)). Here, however, the Florida Supreme Court has approved that conduct as consistent with the state's policy to displace competition in the natural gas industry. Such a decision is exactly what invokes *Parker* immunity.

2. The Refusal to Deal.

I reach the same conclusion with respect to City Gas' refusal to sell wholesale gas to Consolidated.[89] I apply the two prongs of the *Midcal* test in turn.

a. Clearly articulated state policy.

Section 366.03 states: "No public utility shall be required to furnish electricity or gas for resale . . . . " This provision explicitly and affirmatively expresses a state policy not to require utilities to sell at wholesale. Indeed, I could think of no more explicit an expression of this policy. The policy, of course, does not *compel* gas utilities not to sell at wholesale; it merely *permits* them to refrain from selling at wholesale. Under *Southern Motor Carriers*, though, *Midcal's* clearly articulated prong does not require the state to compel the anticompetitive conduct; the state need only permit such conduct, as it does in section 366.03. It is beyond dispute, in my view, that this statutory provision satisfies the first prong of the *Midcal* test.[90]

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[89]Curiously, the panel noted that City Gas challenged the district court's holding that *Parker* immunity did not apply to its refusal to deal, *see* 880 F.2d at 301, but nevertheless failed to address the issue.

[90]The district court claimed that the legislature, in drafting this provision, had in mind sales of gas for resale to landlords who would re-meter the gas for further distribution to their tenants and that the legislature, therefore, did not specifically contemplate wholesale sales to other natural gas utilities. Although the legislature no doubt had in mind sales to landlords, that fact provides no basis for the district court's conclusion that this provision does not apply to wholesale sales to other natural gas utilities. Not only is that reading inconsistent with the provision's plain language, which refers in broad terms to sales of gas for resale generally, but the district court's construction of the legislature's intent is extremely crabbed. Wholesale sales to other natural gas companies also place an administrative burden on the FPSC by altering the structure of competition in the industry or of the utility's assets, thus increasing the complexity of the ratemaking process. *See supra* slip op. at 5220–5221, ____ – ____ The district court's too narrow construction of the

(Footnote continued on next page)

b. Active supervision.

The active supervision prong of the *Midcal* test is also satisfied here. Two reasons support this conclusion. First, by virtue of its rate-setting function, the FPSC regulates a utility's decision to sell at wholesale. If a utility were to decide to sell at wholesale, the FPSC would exercise its ratemaking function with respect to the wholesale price. The utility would therefore base its decision whether or not to sell at wholesale, at least in part, on the likelihood that the FPSC would approve wholesale rates that were sufficiently high to allow the utility to recover a reasonable return on its investment. As I describe above, the economic implications of selling at wholesale may be quite broad—affecting the structure of competition in the marketplace and thus forcing the utility to reconsider the deployment of its own resources. *See supra* slip op. at 5221, ____. The FPSC's rate-fixing process, in the utility's view, might not adequately take into account all of these implications. Or, at least, the utility might be uncertain whether or not the FPSC's rate-fixing calculation would adequately consider these implications. Unless the FPSC were to promulgate regulations expressly dealing with rate calculations for wholesale sales, which it has not, the FPSC would continue to discourage wholesale sales through its rate-fixing process. The FPSC's ratemaking function, therefore, by virtue of its effects on a utility's decision whether or not to sell gas at wholesale, satisfies the active supervision requirement.

Even if the FPSC's ratemaking function did not so affect the utility's decision whether or not to sell gas at wholesale, the active supervision prong would still be satisfied here. As the Court explained in *Patrick*, the purpose of the active supervision requirement is "to ensure that the state action doctrine will shelter only the particular

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legislature's intent is thus inconsistent with the nature of the regulatory scheme created by chapter 366.

anticompetitive acts of private parties that, in the judgment of the state, actually further state regulatory policies." 486 U.S. at 100–01, 108 S.Ct. at 1663. Because the state policy concerning sales of gas at wholesale is to leave such decisions entirely to the utility's discretion, the utility would necessarily be acting in accordance with the state policy whether or not it decided to sell at wholesale. Either decision would be consistent with state policy, and neither decision could be inconsistent with that policy. The state, therefore, would never have to exercise its power to disapprove a decision that failed to accord with state policy: no decision could so fail. In this situation, the concerns behind the active supervision requirement are automatically satisfied regardless of how the state supervises the decisionmaking process. *See* P. Areeda & H. Hovenkamp, Antitrust Law ¶ 212.7, at 168–69 (Supp.1989). For this reason as well, the second prong of the *Midcal* test is satisfied in this case.

C. Conclusion.

As the foregoing discussion shows, even if City Gas' conduct could justify the imposition of liability under section 2 of the Sherman Act, City Gas is immune from liability under the state-action immunity doctrine of *Parker*.

VIII. CONCLUSION

This case's history has been complicated and long. The case is extremely important, however, in that it involves issues of first impression and tests the limits of the antitrust laws. In my view, the district court decided the case improperly, imposing liability on City Gas under section 2 of the Sherman Act. Because this court today upholds the district court's decision, I am compelled to dissent.

As a preliminary issue, City Gas' territorial agreement with Peoples Gas provided no basis for liability here. That agreement had no causal relationship to Consolidated's injury. Consolidated, therefore, has no standing under the

Clayton Act, which authorizes private actions under the antitrust laws, to challenge the territorial agreement.

Nor did City Gas' decision not to sell wholesale natural gas to Consolidated constitute a refusal to deal in violation of section 2. As an initial problem, City Gas did not possess monopoly power in the relevant market. First, the relevant market defined by the district court did not exist. Second, even if that market did exist, City Gas never operated on the wholesale level of the natural gas market; it operated only as a retail distributor of natural gas. Moreover, City Gas' abandoned and unperformed contract with Florida Gas does not suggest otherwise. Third, even if City Gas had operated as a natural gas wholesaler, it would not have possessed monopoly power in that market. FGT had a tremendous share of that market, and Consolidated, given its projections of the profits it could make as a natural gas company, could practicably have turned to FGT for a wholesale supply of natural gas.

Given the fact that City Gas has never operated as a natural gas wholesaler, no basis existed to require City Gas to deal with Consolidated. Under established law, a defendant is liable under section 2 when the circumstances surrounding its refusal to deal give rise to an inference of anticompetitive intent. Courts have developed various formulas—such as the essential facilities doctrine, the monopoly-leveraging theory, and the intent test—for evaluating the circumstantial evidence in a given case in order to determine whether the evidence justifies an inference of intent. The circumstances here, however, give rise to no inference of anticompetitive intent under any of these formulas. Nor does the existing caselaw under section 2 justify the imposition of liability on City Gas. The practical implications of imposing a duty to deal in the present category of case also support the conclusion that section 2 does not apply. In short, the present case simply

did not involve the type of refusal to deal that violates section 2.

In nevertheless imposing a duty to deal under section 2 in the present case, the district court thus created a new rule of antitrust liability, which this court today upholds. Under this new rule, City Gas—a company that has done nothing wrong under established law—must undertake an entirely new level of operation and submit to a forced sale of gas to Consolidated. City Gas must do so, moreover, not because that undertaking will benefit consumers or enhance competition in general—it will do neither—but because the undertaking will enable *Consolidated* to enter the natural gas market as a retail distributor on the most favorable terms possible. That is, this new rule requires City Gas to give its potential competitors a free ride into the natural gas market.

This new rule is, in my view, extraordinarily bad law. It promotes inefficiencies, undermines business firms' rational decisions, and leads to results that are flatly inconsistent with the purposes behind the antitrust laws. In addition, this new rule will be impossible to apply. The district courts of this circuit will face an administrative nightmare in attempting to fashion remedies under this rule. Given these practical implications, Congress surely could not have intended section 2 to support such a rule. This new rule should therefore be struck down.

Even under this impossible rule, however, which this court today upholds, the district court's decision was erroneous. The district court failed properly to apply its own new rule. For that reason, I would vacate the decision and remand the case for further proceedings. Because the rule implicates the fifth amendment, a proper application of the rule depends on a determination of the fifth amendment price for the forced sale of gas here. The district court, however, did not find the fifth amendment price in the present case. As a result, it did not properly determine

(1) whether, given the fifth amendment price, City Gas refused to deal in violation of section 2; and (2) whether, for purposes of the Clayton Act, Consolidated suffered any injury in fact as a result of City Gas' conduct.

In addition, the district court's failure to set a fifth amendment price infected the remedies it awarded Consolidated. First, the district court did not properly calculate its damages awards: those damages must be based on the fifth amendment price. Second, the district court was unable to set a price in its injunction requiring City Gas to sell gas to Consolidated; instead, it delegated the price-setting task to the FPSC. Third, the district court erred in awarding Consolidated both an injunction as well as damages for the loss of its going concern value. Not only are those two remedies theoretically inconsistent, but by awarding Consolidated both remedies, the district court gave Consolidated a double recovery.

For these reasons, even under this impossible new rule, the district court's decision must be vacated, and the case must be remanded so that the district court can properly address these issues.

Finally, even if the district court could properly determine under its new rule that City Gas' conduct violated section 2, in my view, City Gas is still immune from liability under the state-action doctrine of *Parker*. City Gas' conduct—both in entering into a territorial agreement with Peoples Gas and in refusing to sell gas to Consolidated—was consistent with a clearly articulated and affirmatively expressed state policy that was actively supervised by the state.

Based on the foregoing discussion, I respectfully, but strongly, dissent from this court's decision today.

ANDERSON, Circuit Judge, dissenting:

I join Parts IV and V of Chief Judge Tjoflat's opinion, in which he concludes that City Gas was not a monopolist in the wholesale market and that its refusal to deal did not trigger liability under the essential facilities doctrine or the intent test.

I also join subparts A. and B.1. of Part VII of Chief Judge Tjoflat's opinion, in which he concludes that state action immunity would shield City Gas with respect to the territorial agreement. I also join Judge Johnson's dissent on the issue of state action immunity with respect to the territorial agreement.

EDMONDSON, Circuit Judge, dissenting:

For the reasons stated by Judge Tjoflat, I think that City Gas—whether or not it would otherwise be liable—is immune from liability under the state-action immunity doctrine of *Parker v. Brown*, 317 U.S. 341, 351, 63 S.Ct. 307, 313–14, 87 L.Ed. 315 (1943).

Appendix C

APPENDIX C

United States Court of Appeals,
Eleventh Circuit.

Oct. 30, 1989.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC., Plaintiff-Appellee,

v.

CITY GAS COMPANY OF FLORIDA,
A Florida Corporation,
Defendant-Appellant.

No. 87-6108.

* * *

Appeal from the United States District Court for the Southern District of Florida; Stanley Marcus, Judge.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 10, 1989, 11th Cir., 1989, 880 F.2d 297)

Before TJOFLAT, Chief Judge, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, EDMONDSON and COX, Circuit Judges*.**

BY THE COURT:

A member of this court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

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*Judge Clark is recused and will not participate in this decision.

**Senior U.S. Circuit Judge Paul H. Roney has elected to participate in further proceedings in this matter pursuant to 28 U.S.C. 46(c).

IT IS ORDERED that the above cause shall be reheard by this court en banc *with* oral argument during the week of February 5, 1990, on a date hereafter to be fixed. The clerk will specify a briefing schedule for the filing of en banc briefs. The previous panel's opinion and order filed September 22, 1989, are hereby VACATED.

Appendix D

APPENDIX D

United States District Court,
S.D. Florida.

July 24, 1987.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC., Plaintiff,

v.

CITY GAS COMPANY OF FLORIDA, INC., Defendant.

No. 83-1010-CIV.

* * *

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MARCUS, District Judge.

The central issue presented by this case is whether a monopolist involved in the distribution and sale of natural gas, a business regulated by the Florida Public Service Commission, is completely immunized from the sweep of the federal antitrust laws. On the facts of this case, where we can find no clearly articulated state policy or codification conferring any such immunity, we hold that the conduct of Defendant City Gas of Florida, Inc. ("City Gas"), as to the creation of a territorial agreement not to compete in south Florida with its only real competitor in this state, violates the Sherman Act. We also hold that the Defendant's refusal to deal with the Plaintiff, Consolidated Gas Company of Florida, Inc. ("Consolidated"), a tiny potential competitor in south Dade County, as to the transportation or sale of natural gas violates the Sherman Act, *inter alia,* under the essential facilities doctrine. The particular regulatory scheme adopted in Florida does not extend so far as to clothe with absolute immunity the Defendant's demonstrably anticompetitive conduct.

For the reasons which we detail at great length below, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant City Gas has violated § 2 of the Sherman Act, 15 U.S.C. § 2.

2. Plaintiff Consolidated shall recover $1,587,065.15 from Defendant City Gas as compensatory damages, to be trebled pursuant to 15 U.S.C. § 15, for a total recovery of $4,761,195.45 in antitrust damages from City Gas.

3. Consolidated's request for injunctive relief, pursuant to 15 U.S.C. § 26, is granted. City Gas shall sell or transport natural gas to Consolidated at a reasonable price

to be determined, upon Consolidated's request, by the Florida Public Service Commission.

4. Consolidated's claims for costs and attorneys' fees shall be determined upon subsequent motion.

5. Consolidated shall submit a proposed order of final judgment in this cause to this Court within ten (10) days of the date of this Order.

I. THE CLAIMS

Plaintiff has brought suit against Defendant alleging that Defendant violated § 2 of the Sherman Act by monopolizing and attempting to monopolize the natural gas market in south Florida. Plaintiff has sued under 15 U.S.C. §§ 2, 15 and 26 (the Sherman Anti-Trust Act (§ 2) and the Clayton Anti-Trust Act (§§ 15, 26)), seeking injunctive relief, damages and treble damages, costs and attorneys' fees.

Plaintiff has charged Defendant with possessing and illegally exercising monopoly power, and with having wrongfully deprived Plaintiff of access to natural gas while Defendant allegedly took away all of Plaintiff's commercial customers and some of its residential customers, thereby destroying Plaintiff's ability to compete. Plaintiff specifically alleges, among other things, that Defendant acquired and maintained monopoly power from an unlawful territorial agreement not to compete with Peoples Gas System, Inc. ("Peoples"), the only other major natural gas distributor in south Dade; from a grant to Defendant by the Federal Energy Regulatory Commission ("FERC") of the right to purchase natural gas in sufficient bulk to serve many more customers than it serves; and from the fact that Defendant allegedly occupied a "bottleneck" position and was in exclusive possession of essential facilities regarding the transportation and sale of natural gas in portions of Dade County.

The Defendant has filed an Amended Counterclaim alleging in three counts that Plaintiff violated § 1 of the Sherman Act (15 U.S.C. § 1) by engaging in contracts, combinations and conspiracies having as their purpose and effect the restraint of trade with respect to the purchase and resale of gas products; that Plaintiff violated § 2 of the Sherman Act (15 U.S.C. § 2) in that it unlawfully possessed and exercised monopoly power in the Bel Air/Point Royale subdivision, thereby substantially prohibiting or foreclosing Defendant from selling its product therein; and finally that Plaintiff violated § 3 of the Clayton Act (15 U.S.C. § 14) by virtue of an illegal exclusivity agreement between Plaintiff and the subdivision developers and a restrictive covenant running with the land, providing that no liquified or natural gas would be sold within the subdivision unless sold and supplied by Plaintiff.

At the core of Defendant's prayer for relief is the assertion that Plaintiff violated the antitrust laws by these arrangements, improperly binding subdivision customers to purchase gas to be used for power, heating or cooking exclusively from Plaintiff. Defendant contends that as a direct and proximate result of these arrangements, it has been "precluded," "foreclosed," or "delayed" from selling natural gas in the subdivision. Like Plaintiff, Defendant seeks declaratory and injunctive relief, damages and treble damages, costs and attorneys' fees.

This protracted and complex cause came on for trial before the Court, and accordingly, we make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

A. *The Parties*

Consolidated is a retail distributor of liquid petroleum gas ("LP gas") to approximately 2,000 residential and 10 commercial consumers located in the south Dade County subdivision known as the Bel Air/Point Royale Subdivision.

Consolidated's gas is shipped by rail or truck to storage tanks owned by Consolidated, and then is transported from the storage tanks to the ultimate consumer by a series of underground pipes located in easements. Consolidated has been in the LP business since before its current President, Mr. Arnold Rosen, purchased the company in the early 1960's.

Defendant City Gas began business in 1949 as an LP gas company. [Tr. 2–113]. It served district subdivisions throughout Florida and currently serves over 23 such communities. City Gas' principal competitor has been Peoples, which also operated numerous LP gas subdivisions throughout Florida. In 1960, natural gas, which can only be transported by pipeline, became available for resale in southern Florida and both City Gas and Peoples applied for and received allocations to purchase and resell natural gas in Florida from the Federal Energy Regulatory Commission or its predecessor agency. City Gas soon became a major distributor of natural gas in Florida. Currently it purchases natural gas from Florida Gas Transmission ("FGT"), the sole wholesale pipeline supplier of natural gas for resale in Florida. City Gas serves approximately 100,000 residential, commercial and industrial customers. City Gas' pipes and area of service totally surround Consolidated's system. Despite its dominance in the natural gas field, City Gas continued to operate LP subdivision systems until May 1984 through its wholly owned subsidiary, Dade Gas Co. [Tr. 3–104].

B. *Regulation of LP and Natural Gas in Florida*

The LP gas business is unregulated; no governmental franchise or approval is required to purchase and resell LP gas. Moreover, LP gas is not subject to rate regulation by the Florida Public Service Commission ("FPSC"), although its resale rates were subject to a federal price ceiling from 1973 until 1981. [Exec. Order No. 12,287, 3 C.F.R. 124 (1982)]. In contrast, natural gas distributors are regulated public

utilities. Each natural gas distributor must obtain an "allocation" from the FERC in order to purchase natural gas from a pipeline company such as FGT. [Tr. 4–8]. Additionally, the regulatory process controls the resale prices of natural gas in three ways. First, FERC regulates natural gas "wellhead" prices, which are the prices paid by pipeline companies such as FGT to natural gas producers. Second, FERC regulates FGT's wholesale price of natural gas to natural gas distribution companies such as City Gas. Finally, the FPSC regulates natural gas distribution companies' retail rates to residential and commercial consumers.

The FPSC's regulation of natural gas distributors, however, is not all-inclusive. For although rates are determined through a complex and heavily monitored process known as a "rate case," other critical aspects of a natural gas distributor's business conduct are addressed either on a hit-or-miss basis or are simply not regulated at all by the FPSC.[1] Particularly relevant to this case is the FPSC's regulation of territorial agreements between natural gas distributors. These important agreements are not required to be approved by the FPSC; they are in fact only considered when a utility requests FPSC approval, and they are only subsequently reviewed if a complaint is filed with the FPSC.

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[1]We also note in passing that Plaintiff presented evidence at trial that Florida's regulatory scheme was incomplete even as to the regulation of rates. Specifically, Plaintiff argued that such regulation is an imperfect constraint on a utility's ability to exploit a monopolistic position, that competition between regulated utilities yields lower prices, and that when rate regulation is the sole limiting factor on the exercise of monopoly power, utilities can earn above normal rates of return. [Tr. 6–253–257]. It is not essential to our holding that we address the crux of Plaintiff's argument, which amounts to a direct challenge to the regulatory process. We do note, however, that this argument was raised and was not controverted by Defendant.

C. *Gas Availability and Price Structure*

During the 1960's and up to the onset of the Arab Oil Embargo in 1973, the price of LP gas was slightly higher than the price of natural gas, but the prices of both were extremely low. Indeed, the two to three-cent-per-therm price differential that existed during this time period created little incentive for distribution companies or consumers to undertake the risk and expense of converting from LP gas to natural gas. [Tr. 6–54]. In 1973, however, the Arab Oil Embargo caused unprecedented increases in world oil prices. Despite some federal price controls, LP gas prices rose much more rapidly than natural gas prices which were subject to regulation at the wellhead, at wholesale, and at retail. The resulting price differential, which approached twenty cents per therm at the wholesale level, suddenly made conversion to natural gas much more economically desirable. However, during the remainder of the 1970's until 1981, there was a national shortage of natural gas. As a result, the federal government established a rationing program which in turn curtailed pipeline distribution. [Tr. 6–54–55]. During this era of precedented instability, natural gas prices were kept artificially low by the three-tiered regulatory scheme. These low prices were such potent disincentives to production that they, in turn, were responsible for the natural gas "shortage" that contributed to the federal government's conservation policy and rationing program.

In addition to the Arab Oil Embargo, in 1979 the supply of crude oil, from which LP gas is refined, was reduced because of the cessation of oil imports from Iran, and in January 1981, federal price controls were lifted to increase supply. Thus, in 1981 LP gas cost twice as much as natural gas. As a result, LP gas became the 1980's dinosaur of retail fuel products. Like whale oil, it had become obsolete. It could no longer compete with natural gas.

It was not until the first quarter of 1981 that a small surplus of natural gas appeared. This surplus grew rapidly

from approximately 3% to 4% in 1981, to 12.3% by the end of 1982. [Tr. 6–289]. By October of 1983, the surplus had reached 30.2%. [*Id.*]. This surplus is expected to last beyond the year 2000.

As a result of the dramatic increase in the cost of LP gas, LP distributors began to consider the wisdom of converting their systems to natural gas. Whereas natural gas must be transported by pipeline, LP gas is transported in containers and is then distributed to consumers through an underground pipe system. [Tr. 6–52]. Because the same underground system used for LP gas distribution is suitable for natural gas distribution, an LP system located near a natural gas pipeline may be converted to natural gas on an economically feasible basis. Conversely, many LP systems are located at too great a distance from a natural gas pipeline to justify the capital expenditure necessary to extend a pipeline to a natural gas source. [Tr. 6–52].

Consolidated began its efforts to switch from LP gas to natural gas on March 9, 1982. On this date its controller, Richard Fleisher, wrote a letter to FGT requesting that FGT begin providing it with natural gas, and that FGT construct the necessary pipeline facilities. [Tr. 1–11; Plaintiff's Ex. A–0004]. On April 2 1982, FGT responded that in order to buy gas from FGT, Consolidated first had to obtain a FERC natural gas allocation. [Tr. 4–12–13; 1–12]. Additionally, FGT advised Consolidated that it would be required to reimburse FGT for the cost of connecting Consolidated's system to the FGT pipeline. This cost was then estimated to be approximately $250,000. [Tr. 4–13]. FGT suggested that, as a more economical alternative, Consolidated might arrange for a connection with City Gas' system, which was located much closer to Consolidated's system than the FGT pipeline. [Tr. 4–13]. In any event, for sound economic reasons Consolidated determined that it wanted to have a natural gas allocation and consequently applied for one from the FERC on May 21, 1982. Consolidated's application was

the first application of its type to the FERC for a new natural gas allocation in 12 years. [Tr. 6-287].

D. *City Gas' Market Power*

In order to determine City Gas' market power, we must first define the relevant market. It is clear based on an analysis of functional interchangeability and cross-elasticity between natural gas and LP gas that the relevant product market in this case is composed solely of natural gas. For although natural gas and LP gas are functionally interchangeable as to use, there is no cross-elasticity between them. Where natural gas is available, LP gas simply cannot compete because of its overwhelming price disadvantage. Like whale oil after the advent of kerosene, LP gas is obsolete in any geographic area where natural gas is available. However, even if the relevant product market consists of both natural gas and LP gas, as City Gas asserts—a proposition which we cannot accept, because of the enormous price differential between the two products and the lack of any evidence which suggests that this situation will change in the foreseeable future—we find that our result would remain unchanged. City Gas' market share even in the combined natural gas/LP gas market is so great that it has market power even in this market.

We also find that the relevant geographic market in this case consists of City Gas' territory, Consolidated's service area, and the as yet unserved portions of southwest Dade County. The only alternative choice for a relevant geographic market, presented to us by Defendant, is that of Consolidated's service area. In an economic sense, however, this geographic area is meaningless. Consolidated's service area has nothing to do with either the area in which the sellers compete or the area in which prospective purchasers will turn for sellers. Rather, it is clear that City Gas serves customers well beyond Consolidated's service area, which its pipes surround, and that Consolidated would like to compete beyond its service area as well. Additionally, it has

been established that customers in Consolidated's service area look beyond these boundaries for sellers of gas. Indeed, many of these customers have already done so by turning to City Gas for service. Thus, we reject City Gas' theory of the relevant geographic market.

With the relevant market established, we now turn to the measurement of Defendant's market power. First of all, we observe that City Gas' market share is overwhelming. The market shares of natural gas companies in the relevant market in 1981 were as follows: City Gas sold 123,734,000 therms of natural gas in 1981; Miller Gas sold 2,836,000 therms; Plaintiff did not sell any natural gas. This computes to a 97% market share for City Gas and a 2.4% share for Miller Gas. [Tr. 7–3]. Moreover, City Gas had 100% of the market for "hookups" of new natural gas customers during 1981. [Tr. 7–4]. In the second place, the record evidence has established that entry barriers in the natural gas business are high because the potential entrant must build or acquire a costly pipeline distribution network and a way to obtain natural gas, whether from the FERC or another distributor. Indeed Consolidated experienced enormous difficulty in attempting to enter the market, even though it had already made a substantial distribution network. Third, we note that exit barriers in the industry are also high because a company withdrawing from the natural gas business could not easily withdraw its money from its pipelines by converting them to some other business line. [Tr. 7–6]. A fair review of the evidence adduced at trial therefore establishes Defendant's overwhelming market share.

In deciding to convert from LP gas to natural gas in 1982, Consolidated suddenly found itself in potential competition with City Gas, which had grown to be a giant in the south Florida area. Because only three companies in Florida had natural gas allocations, and because natural gas became substantially less expensive than LP gas, City Gas had expanded quickly.

City Gas' power was further strengthened by a territorial agreement which it entered into in September 1960 with its only major competitor, Peoples. [Plaintiff's Ex. C–0018]. This agreement delineated separate natural gas service areas for each of the natural gas companies and eliminated any competition between them. [*Id.*]. Under the terms of the agreement, City Gas and Peoples essentially divided up south Florida into the areas Peoples would serve and the areas City Gas would serve; each promised not to compete in the other's territory. City Gas and Peoples requested the Florida Public Utilities Commission (now the "FPSC") to approve their territorial agreement, and it was subsequently approved by the Commission, which observed that such agreements were in the public interest and should be encouraged. The territorial agreement remains in effect, and City Gas and Peoples, the two largest natural gas companies in Florida, do not compete with each other. [Tr. 3–93]. While City Gas and Peoples do not compete with each other, they are not precluded from competing with other smaller natural gas companies within the service areas which each reserved to itself under their agreement. Consolidated's small LP system is located deep within City Gas' territory. Consequently, Consolidated was forced to compete with City Gas in order to retain its customers or else see them go to City Gas for more economical gas service.

The region of southwest Dade County in which Consolidated is located is projected to be one of the fastest growing portions of Dade County through the year 2005. [Tr. 6–234–237]. The areas adjacent to Consolidated's system are expected to experience growth of approximately 144.3%, which amounts to some 88,185 people over the next twenty years. [Tr. 5–234–237]. This growth should take place in the areas to the west, north and south of Consolidated's present area of service. [Tr. 5–237]. Between 1984 and 2005, this growth in population should generate a 130.1% increase in the number of housing units in these areas, which means that approximately 34,225 housing units will be constructed

during these years. [Tr. 5–237–239]. Related commercial building is expected to increase along with the population. [Tr. 5–238]. New light commercial and service enterprises such as restaurants, stores, cleaners and other businesses likely to use gas can be expected to accompany the expansion. [*Id.*]. Accordingly, Consolidated should be able to expand its system in response to this growth if it can procure a competitively priced source of natural gas.

Indeed, since 1982 a dozen new businesses have been constructed in Consolidated's territory, but Consolidated has been unable to serve them because it does not have natural gas. [Tr. 1–25]. Moreover, during 1984, City Gas began providing service to seven commercial accounts in a shopping center adjacent to Consolidated's service area. [Tr. 6–73]. Thus, it became crucial that Consolidated convert to natural gas for as low a cost as possible in order to be able to offer rates that were competitive with those City Gas could offer. In order to compete effectively, Consolidated believed it was imperative that FGT provide Consolidated with a first connection to the natural gas pipeline at FGT's cost. The amortization of the estimated $250,000 capital cost of this lateral pipeline would have increased Consolidated's cost of securing natural gas by approximately five cents per therm. [Tr. 6–91–92]. City Gas had already received approximately ten such connections with FGT at no cost and thus it did not have similar expenses driving up its natural gas rates. [Tr. 5–187–188].

Faced with these problems, Consolidated was left with three potential courses of action if it was going to remain in business: (1) obtain a FERC allocation and hope that it could convince FGT to pay for the lateral pipeline connection; (2) connect a pipeline to City Gas' pipe and purchase gas directly from City Gas; or, finally (3) obtain a FERC allocation, connect a pipeline to City Gas' pipe, and pay City Gas the cost of transporting gas through City Gas' pipes. Two of these courses of action required Consolidated to deal

directly with its future competitor, and the third alternative, as the facts reveal, involved unreasonable delays and uneconomically high expenses. In response to Consolidated's dilemma, City Gas, the only natural gas distributor with pipelines near Consolidated's service area, responded by attempting to eliminate its tiny competitor, as it had already succeeded in doing to two other small LP distributors, Nationwide Utilities ("Nationwide") and Miramar Gas Company ("Miramar").

The pattern established by City Gas' acquisition of Nationwide and Miramar is, we believe, particularly instructive in this case. At the time that it acquired Nationwide, in 1980, City Gas' pipelines surrounded the area served by this small LP distributor, located in south Broward County. City Gas had the only supply of natural gas to offer for sale in the area and Nationwide did not have a natural gas supply of its own. Consequently City Gas installed a line and began to provide natural gas to a number of residential customers served by Nationwide. [Tr. 3–122]. Nationwide could not compete with City Gas once it began soliciting and hooking up its customers, simply because LP gas could not compete with the price advantage of natural gas. [Tr. 3–123–124]. On July 31, 1980, City Gas bought Nationwide for $300 per active customer. [Plaintiff's Ex. C–0047].

In early 1982, City Gas acquired Miramar, another small LP distributor in south Broward County. Here again, City Gas' pipeline surrounded the area served by Miramar, and City Gas had the only supply of natural gas to offer for sale in the area. City Gas began converting some of Miramar's customers to natural gas [Tr. 2–202–203], and was then able to purchase Miramar for $385 per active customer. [Tr. 3–117–120].

When Nationwide and Miramar sold their businesses to City Gas, there was no other distributor from whom they could have purchased natural gas or to whom they could

have sold their systems. [Tr. 3–124–125]. In view of City Gas' FERC allocation, its market share in the geographic area and the absence of any other natural gas supply, Nationwide and Miramar had no other realistic choice but to sell to City Gas. In 1982 Consolidated faced a simlar dilemma. We think City Gas' policy of acquiring tiny competitors was part of its underlying purpose to eliminate all competition within its region.

E. *City Gas' Efforts to Acquire Consolidated*

On February 22, 1982, City Gas' Board of Directors ratified and approved City Gas' contract to purchase Miramar. At the same meeting the Chairman of the Board, Sid Langer, advised the Board that he had been "attempting to acquire the gas properties of Consolidated," and the Board passeda resolution authorizing Mr. Langer and its other officers to "work out the acquisition of the assets of Consolidated Gas Company and take whatever steps with respect thereto, as they deem appropriate." [Tr. 5–223; Plaintiff's Ex. G–0089]. However, no one from City Gas had ever contacted anyone at Consolidated prior to February 22, 1982 about buying the company, and no contact of any kind was made with Consolidated until late March of 1982 when City Gas' president, Jack Langer, telephoned Consolidated's controller, Richard Fleisher, to advise him that City Gas had already begun to serve some of Consolidated's customers and intended to serve others. Subsequently, in May of 1982, Sid Langer and Jack Langer of City Gas met with Arnold Rosen of Consolidated to discuss the idea that City Gas purchase Consolidated. [Tr. 2–171–172; 3–8]. At the meeting, Sid Langer offered to buy Consolidated for the same price per customer that City Gas had paid for Nationwide, which Mr. Rosen understood to be $300 per customer. [Tr. 3–9]. Mr. Rosen stated that he wanted $900 per account. [Tr. 2–173]. No agreement was reached and Mr. Rosen left. [Tr. 3–10].

On February 23, 1982, one day after the Board resolution authorized Sid Langer to attempt to acquire Consolidated and notably before City Gas had notified Consolidated of its interest in pursuing an acquisition, City Gas' sales manager, Ken Kessler, sent his sales staff out to make door-to-door solicitations of Consolidated's customers. Some of these customers had signed a 1981 petition which they sent to City Gas and which requested that natural gas service be offered to them, but most of them had not. At least 60 of Consolidated's approximately 2,000 customers were solicited [Tr. 5–201], and nine signed up to receive natural gas from City Gas. City Gas then sent letters to residents offering City Gas' natural gas service, and followed up with door-to-door solicitations. Furthermore, City Gas' representatives left door knob hang-tag advertisements at the homes of Consolidated's customers if no one was home. [Tr. 2–11–13]. City Gas also ran newspaper ads directed specifically to people living near the Point Royale Shopping Center (within Consolidated's service area) who were receiving LP gas, inviting them to call for a free survey as to the feasibility of receiving natural gas. [Tr. 2–17]. It would be fair to characterize City Gas' sales efforts in Consolidated's service area as "full scale." On April 5, 1982, City Gas began extending its pipelines [Plaintiff's Ex. E–0008] to serve eighteen of Consolidated's residential customers which it had solicited in February.

City Gas' solicitation behavior, after its Board decided to attempt to acquire Consolidated but before it notified Consolidated of its intentions, leads us to find that City Gas' solicitations and pipeline extensions were not simply ordinary business expansions, but rather, were basic components of City Gas' strategy to force Consolidated to sell out. This conclusion is further supported, we think, by the fact that City Gas had to duplicate a portion of Consolidated's pipeline in order to serve the eighteen Consolidated customers it had recently signed. Yet if City Gas had expected to reach a purchase agreement with

Consolidated, it would have acquired Consolidated's pipelines and would not have had to incur this expense. City Gas' action of duplicating these pipelines before notifying Consolidated of its interest in acquiring the company seems to have been designed to force Consolidated to sell at a low price or face the resultant certainty of losing its customers and their value as quickly as City Gas could serve them.

F. *Consolidated's Easement Agreements*

In expanding its system into the territory that was supplied by Consolidated, City Gas placed its own gas mains and lines in utility easements which had been granted to Consolidated by a recorded "Easement Agreement" dated December 13, 1963. As a public utility, under Florida law, City Gas possessed the power of eminent domain entitling it to condemn and to pay just compensation for any real or personal property rights necessary for its provision of natural gas service to any customer. City Gas did not consider selling natural gas to customers in Consolidated's territory until 1982. Prior to June 1, 1982, when a state lawsuit was filed by Consolidated against City Gas and served upon City Gas thereafter, City Gas had no knowledge of this recorded "Easement Agreement" or any of its provisions. City Gas also had not researched the public records to determine whether Consolidated had rights under any recorded documents. City Gas had observed other gas companies supplying gas in the subdivision, and believed that it was free to provide gas service to any home or business located in the subdivision. On or about June 1, 1982, Consolidated filed suit in Dade County Circuit Court against City Gas, seeking to enjoin City Gas from infringing upon the easements which had been granted to Consolidated by this recorded Easement Agreement. On June 16, 1982, the Circuit Court issued its order Granting Preliminary Injunction, ordering City Gas to cease and desist from extending any additional gas lines into the subdivision until further order of the court and requiring Consolidated to post

a $5,000 injunction bond. While the injunction was in effect, City Gas continued supplying natural gas to the former Consolidated customers which it had already hooked up to its system. The preliminary injunction was dissolved by the Circuit Court in its Final Judgment dated November 30, 1982. Immediately after the Circuit Court dissolved the preliminary injunction, City Gas again began extending its system to provide natural gas service to homes and businesses located within the subdivision.

On March 6, 1984, the Third District Court of Appeal affirmed the Circuit Court's Final Judgment on the grounds that (1) the portion of the Easement Agreement which gave Consolidated "an exclusive franchise" did not create an exclusive property right enforceable by Consolidated against City Gas, and (2) that the Easement Agreement by its terms gave Consolidated a "perpetual right of way easement" but did not create an exclusive right of way easement. The Court held that City Gas, a public utility, was not precluded by the Easement Agreement from using the servient land in any manner not inconsistent with the limited non-exclusive rights vested in Consolidated as the easement owner.

City Gas asserted as an affirmative defense in the state court litigation that the recorded "Easement Agreement" was invalid as a restraint of trade, but at no time did City Gas file or attempt to file a counterclaim alleging the illegality, under the Florida Antitrust Act of 1980 or other provisions of state or federal law, of any exclusive rights claimed by Consolidated in the easements in the subdivision. On March 4, 1985, Consolidated and City Gas entered into a settlement in the form of a stipulation pursuant to which the state litigation was ended with a Stipulated Order Directing Disposition of Injunction Bond, which was entered in circuit court on March 6, 1985. The settlement stipulation, was signed by both Philip Schiff, the attorney for City Gas, and Sid Langer, President and Chairman of the Board of City

Gas. It and the Stipulated Order were drafted by Phillip Schiff.

G. *Consolidated's FERC Application*

On May 21, 1982, Consolidated applied to the FERC for a natural gas allocation so that it could resell natural gas to its customers. [Tr. 1–13; Plaintiff's Ex. B–0011 (1 of 122)]. Consolidated's application was filed under Section 7(a) of the Natural Gas Act, which requires an applicant to demonstrate that it has the technical and financial ability to distribute gas to customers; that the pipeline from which it seeks service (in this case FGT) has an adequate supply of gas; and that the customers who would be provided with gas service would derive some benefit from it. [Tr. 4–9].

On June 21, 1982, City Gas filed a petition with the FERC requesting leave to intervene in Consolidated's application to oppose its request for natural gas. [Tr. 1–14; Plaintiff's Ex. B–0012, B–0011 (9 of 122)]. City Gas' Petition to Intervene asserted that City Gas had existing transmission and distribution lines extending through the heart of the proposed service territory, as well as around it, and that City Gas anticipated that it would soon convert a majority of Consolidated's customers to natural gas. [Tr. 1–14–15; Plaintiff's Ex. B–0011 (9 of 122)]. City Gas also raised questions about the capacity of Consolidated's system to operate at the pressures necessary to deliver natural gas. City Gas further argued that Consolidated should have to pay the $250,000 cost of the FGT lateral connection. [Plaintiff's Ex. A–0001 at 14]. Finally, City Gas challenged Consolidated's application on the basis of the adequacy of the natural gas supply.

On November 21, 1983, the presiding administrative law judge ("ALJ") granted Consolidated's application and rejected City Gas' arguments. [Plaintiff's Ex. B–0011 (52 of 122)]. The FERC affirmed that decision on September 19, 1984, but it ruled that Consolidated should pay the cost of

connection with FGT's pipeline. [Plaintiff's Ex. B–0011 (115 of 122); Tr. 3–21]. The FERC opinion stated:

> There is no doubt that Consolidated's proposed project would be economically feasible, if City did not have its eye on capturing Consolidated's propane gas customers. . . .
>
> . . . .
>
> We admit that it is difficult to predict whether Consolidated's project will be a success. But we need not make a "conclusive, definitive, formal finding" of economic feasibility. It is enough that there is a possibility of economic success. We think there is enough of a reasonable likelihood that Consolidated will retain its present customers and, therefore, be successful as a natural gas distributor for us to grant its request. The fact that its market is threatened by competition from City does not lead us to deny that request, for we do not think it in the public interest to deny Consolidated the right to compete.

[Plaintiff's Ex. B–0011 (115 of 122) at 3-4 (footnotes omitted)].

The FERC also observed:

> And at bottom that is what we are concerned with—the public interest. If we deny Consolidated's request, City will win the war by default.

[*Id* at n. 12].

The opinion further held:

> The record shows that standing alone both Consolidated and City could successfully serve Consolidated's customers. We do not believe it is appropriate for us to determine which is the rightful distributor. That should be done by Consolidated's customers. We should not deprive them of the right to

> choose between two competitors for their natural gas service. Accordingly, we grant Consolidated's application as modified below.

[*Id.* at 4–5 (footnote omitted)].

There is no doubt that City Gas' intervention profoundly altered the course and nature of the FERC's consideration of Consolidated's application. If full litigation of factual disputes had not been necessary, it would have taken only six to nine months for the FERC to have reached a final decision. [Tr. 4–18]. City Gas' intervention caused a delay in the proceeding of more than one year. [Tr. 4–78]. Additionally, if City Gas had not intervened Consolidated could have received a temporary certificate entitling it to obtain natural gas within 90 days of the filing of its application. [Tr. 4–20]. Because City Gas intervened, this option became unavailable.

It is also demonstrably clear that the delay in the FERC proceedings severely hurt Consolidated. During the course of the proceedings, City Gas began providing service to seven of Consolidated's eight commercial customers and the bulk of its residential customers. [Tr. 5–131–133]. Since Consolidated could not purchase natural gas from FGT without final FERC approval, its first and third courses of action were effectively foreclosed. Consequently, Consolidated was left with only its second alternative if it was to remain in business: the purchase of natural gas directly from City Gas.

H. *City Gas' Proposed Terms for the Sale or Transportation of Natural Gas*

As we have observed already, Consolidated had to purchase natural gas from City Gas because the next nearest natural gas distributor, Miller Gas, a small company when compared to City Gas and Peoples, was located approximately fifteen miles away. The cost of connecting a lateral to Miller's pipeline would have exceeded $5,000,000

[Tr. 3–19], more than the entire net worth of Consolidated. Thus, Consolidated had no alternative but to purchase gas from City Gas.

During the course of the FERC proceedings, City Gas was asked by FERC personnel if it would consider selling natural gas to Consolidated. City Gas indicated that it would sell natural gas to Consolidated at City Gas' cost plus ten cents per therm, with Consolidated paying all costs of connection, metering and other costs. [Tr. 119–20; 3–13–14]. In making this offer, City Gas knew that the FPSC would not approve sales on these terms because the rate was too high. [Tr. 3–226–227]. Indeed, City Gas' Vice President, Mr. Ball, testified that he made no attempt to ascertain a reasonable price for direct gas sales to Consolidated, and that he came up with the cost plus ten cents terms "out of the air." [Tr. 3–284]. At the time that City Gas made this offer, it had a contract to sell natural gas to Florida Gas for cost plus one cent per therm and it was buying gas from Peoples for resale under their non-competition agreement for one development in Peoples' territory at cost plus seven cents per therm. [Plaintiff's Ex. C–0051; Tr. 3–141–144, 5–182, 2–140].

Consolidated also proposed that City Gas allow its system to be used to transport natural gas from FGT's pipeline to Consolidated if Consolidated received its own FERC allocation. City Gas rejected this suggestion.

City Gas did not modify its purchase or resale offers in any way until March 25, 1983, when the FERC staff scheduled a conference in Washington. [Tr. 3–227–228; Plaintiff's Ex. A–0076]. The FERC's purpose in calling this conference was to identify "settlement postures" and it directed the parties to "send a representative authorized to enter into binding negotiations on that party's behalf." [Plaintiff's Ex. A–0075]. At the March 23, 1983 FERC settlement conference, Consolidated proposed that City Gas transport natural gas to Consolidated at cost plus two and

one-half cents per therm, but City Gas responded that this offer was "out of the question." [Tr. 3–67; Plaintiff's Ex. A–0076]. Later in the conference, City Gas for the first time lowered its resale offer from cost plus ten cents to cost plus seven cents per therm, with Consolidated paying all costs. [Tr. 3–16–17; 3–228]. Consolidated had received advice that City Gas' seven-cents-per-therm offer was far beyond competitive levels and that a price between 3 mills and one cent per therm was a reasonable range. [Tr. 3–69]. However, because the FERC staff was pushing for a settlement and City Gas' actions were threatening Consolidated's existence, Consolidated proposed that City Gas sell or transport at cost plus two and one-half cents and, later, at cost plus five cents, even though Consolidated believed these prices to be unreasonable. [Tr. 3–69–70; Tr. 5–41–42].

At the close of the conference, City Gas handed Consolidated a written "Final Offer," in which City Gas (1) reiterated its offer of $385 per active customer to purchase Consolidated's system on terms of ten percent down and ten percent interest over a ten-year term; and (2) stated that it would sell or transport natural gas to Consolidated for resale at cost plus seven cents per therm, with Consolidated paying all costs of connections and metering equipment. [Plaintiff's Ex. A–0041]. On June 23, 1983, City Gas wrote to Consolidated attaching a "Settlement Offer" dated June 7, 1983. [Plaintiff's Ex. C–0060]. In that offer, City Gas restated its purchase offer of $385 per active customer, thereby excluding Consolidated's former customers. The June 7th offer also retracted City Gas' short-lived offer to transport gas from FGT to Consolidated for a seven-cent markup, referring only to the sale of natural gas to Consolidated at cost plus seven cents per therm. [*Id.*]. The accompanying letter stated that the June 7th offer would be withdrawn on June 27, 1983, unless either offer were accepted. [*Id.*]. Following the June 27th expiration of the June 7th offer, City Gas made no offer of any kind to sell or transport natural gas to Consolidated. [Tr. 3–235].

The expert testimony presented at trial by Consolidated convincingly established that neither price term was a reasonable or competitive price. First, City Gas' marginal cost in selling or transporting gas to Consolidated was at or near zero since, under both offers, Consolidated was to pay all costs of connection and metering. At most, City would incur the expense of opening and maintaining a new account on its books and reading the meter on a monthly basis. Second, City Gas had no opportunity costs, which are the costs of providing this service to Consolidated instead of some other customer. City Gas had and still possesses a vast, unused natural gas entitlement of approximately 27 million therms per year in excess of its needs [Tr. 5–166–167], and its sale or transportation of 600,000 therms or less of gas to Consolidated would cost City Gas no other sales. Third, the price City Gas demanded bears no reasonable relation to its costs of providing the service. FGT charges approximately thirty-two cents per therm which includes its cost of gas and the cost of transporting it from producing fields in Texas and Louisiana to south Florida. [Tr. 6–61]. City Gas demanded between 25% and 33% of that just to transport gas a few thousand feet. [Tr. 6–61–63]. Thus, in selling or transporting gas on the terms it quoted, City Gas would be earning far more per therm than the three to four cents net profit it earns on an average for all the therms it sells to all other customers. [Tr. 6–60].

City Gas argued that the cost-plus-seven-cents offer was reasonable because that is what it paid Peoples under the Limited Waiver agreement to serve one community in Peoples' territory. Notably, no witness even ventured any opinion that the ten-cent offer was reasonable. But even the seven-cent offer cannot be justified by the Peoples-City Gas non-competition agreement seven-cent rate because this agreement was not reached in a competitive setting. Under the agreement, Peoples and City Gas do not compete in the area being served. Consequently, City Gas has been able to pass the seven-cent price increase along to its customers

without fear of losing them to Peoples. The situation facing Consolidated was entirely different. If it was required to pay seven cents more for gas than City Gas, it would obviously be at a severe price disadvantage in selling natural gas in head-to-head competition with City Gas.

City Gas also argued that the seven-cent markup must be reasonable because the FPSC approved those terms for Peoples' sales to City Gas. The evidence does not support that argument, because it was established that the FPSC does not pass on the reasonableness of the charge between two large industrial firms, such as City Gas and Peoples, based upon the obviously sound assumption that they can take care of themselves in the marketplace. [Tr. 6–64].

The expert and lay testimony indicated that because the costs to City Gas of providing the service are effectively zero, a fair and reasonable price for City Gas' sale or transportation of natural gas to Consolidated would probably be in the area of one cent per therm over other costs. [Tr. 7–15]. This Court will not attempt, nor do we feel required to determine exactly what a fair price would be. The task is best left to regulatory agencies, such as the FPSC, which would regulate Consolidated if it still seeks to sell natural gas to consumers, or to the marketplace. The FPSC is designed to make such complex and specialized rate determinations and to monitor continuously the rates of natural gas companies. The federal courts, on the other hand, are not well equipped to set a "fair price," or to monitor the changing circumstances which might merit a review of such a determination. Accordingly, all that we find on this record, and we believe the facts as developed at trial compel this finding, is that the price terms for the sale or transportation of natural gas which City Gas proposed to Consolidated were wholly unreasonable. The terms bore no relationship whatsoever to any economic calculation which Defendant might have made. We believe, in short, that the

price terms were the functional equivalent of a refusal to deal at all.

City Gas' true objectives were further revealed by its demands for excessive sale or transport prices and its willingness to forego short-term profits on reasonably priced natural gas sales to Consolidated. Since prior to 1980, City Gas has had an allocation entitling it to purchase and sell much more natural gas each year than it is able to resell to its customers. In 1981, City Gas' largest industrial customer, Lonestar Florida, Inc., reduced its annual purchases of natural gas from City Gas. This left City Gas with an excess supply of approximately 27 million therms of natural gas annually, in addition to the surplus it already had. [Tr. 5–166]. Consolidated's LP gas consumption equals approximately 491,000 therms of natural gas per year. [Tr. 5–167]. Had City Gas sold a portion of its excess gas to Consolidated when Consolidated was asking to buy the gas, it could have supplied all of Consolidated's needs with only 1.8% of City Gas' excess gas supply. [*Id.*]. In fact, *transporting* gas for sale to Consolidated's customers would have consumed none of City Gas' allocation at all.

Additionally, there were no engineering or other impediments to City Gas' selling or transporting gas to Consolidated. Consolidated's pipe system is well suited for natural gas delivery and, in fact, is virtually identical to City Gas' system. The cost of interconnecting the two systems would be approximately $21,752 and both systems would have functioned properly with such interconnection. [Tr. 2–309–310; Plaintiff's Ex. A–0071].

We have concluded that City Gas' offer was tantamount to a refusal to deal and we think City Gas' purpose in making it was to destroy a potential competitor, no matter how small and inconsequential it may have been. This conclusion is amply supported by the record in this case. The purpose behind City Gas' conduct was, we believe, candidly stated by its Chairman of the Board, Sid Langer.

When Mr. Langer was asked whether the receipt by Consolidated of a natural gas allocation to serve its 2,000 customers would deplete the natural gas supply to the other natural gas distributors, his answer was surprisingly telling:

> A. Of course; *plus, it would give every other propane dealer . . . a chance to request natural gas for their own development throughout the state or throughout the country. God only knows.*

Q. What is wrong with LP companies getting natural gas?

A. Nothing wrong with it.

Q. You said—

A. Except *you try to protect your own domain*, and there is nothing wrong with that either.

Q. Okay. Does it make any sense to argue that if Consolidated Gas received an allocation to serve those 2,000 customers, that it would reduce the supply of gas available?

A. Maybe yes, maybe no. . . .

[Tr. 3–161–162] (emphasis added).

Mr. Langer's testimony was echoed by City Gas' Vice-President, Ivan Ball, who indicated that City Gas' intervention in the FERC proceeding was "almost automatic" as it was Defendant's policy to oppose the allocation of natural gas to any other company in what it believed to be its "natural gas territory." [Tr. 3–174]. Ball also testified that if Plaintiff's FERC application were granted "it [would mean] that any propane company up and down the State could get an allocation." [Tr. 3–264; *see also* testimony of Jack Langer, Tr. 8–64]. The Defendant City Gas quite apparently believed that because it was involved in a regulated industry, it had untrammeled authority to eliminate any potential competitor within its area of operation.

I. *The Feasibility of City Gas' Expansion to Serve Consolidated's Customers*

Still further indication of City Gas' underlying purpose may be gleaned from its uneconomical expansion into Consolidated's service area without requiring its new customers to pay "contributions in aid of construction" which City Gas normally charges in such circumstances. The FPSC requires all public utilities to observe regulations pertaining to the allocation of costs of extension of utility facilities to serve new customers. The purpose of these regulations, commonly referred to as "feasibility rules," is to protect present customers of the utility from having to subsidize the utility's speculative expansion into areas that are not economically and financially feasible. [Tr. 5–115]. Prior to April 29, 1983, the feasibility of City Gas' extension of its service to a new customer or group of customers was to be determined by a formula comparing the costs of the extension to twice the gross annual revenues earned from the customer. If the cost of the extension exceeded two times annual gross revenues, then a contribution in aid of construction was to be charged to the utility customer, alleviating the cost burden to the utility and also protecting the other customers from the costs of subsidizing that extension. [Tr. 5–116; Plaintiff's Ex. D–0001; Plaintiff's Ex. J–0004].

In applying the feasibility rule, the proper method for determining the estimated annual revenue from a new customer who has been receiving gas service from another company is to estimate consumption based on past consumption as reflected in prior bills. If the new customer has no history of gas consumption, then alternative estimates may be employed, such as tables that indicate consumption levels for various appliances. But the latter method may not be properly employed where the customer has a history of gas consumption. [Tr. 5–116, 147]. The cost of a given extension of facilities may be determined through

estimates of the costs of constructing the facilities by the contractor or by the engineering department of a utility company. [Tr. 5–116–117].

City Gas performed no true feasibility study of any kind prior to the expansion of its system to the bulk of Consolidated's customers. City Gas' estimates of annual revenues from those customers were exaggerated and any feasibility study based on those estimates would have provided a distorted view of the feasibility of the expansion. Although all of Consolidated's former customers had gas appliances and a history of gas consumption, City Gas' salesmen made no effort to determine past consumption levels. Instead, the salesmen used the appliances' maximum gas consumption ratings from plates located on the appliances and then projected annual revenues by multiplying those revenues by City Gas' prevailing rates. [Tr. 2–42; 2–85–87]. As a result, City Gas' estimates of annual revenues were far in excess of its new customers' historical and actual consumption. In fact, City Gas' estimates of annual therms and revenues for new residential accounts taken from Consolidated were overstated by some 71.1%, and City Gas' estimates of annual therms and revenues for its new commercial accounts were overstated by approximately 35.6%. [Tr. 5–117–120]. In view of the information available to City Gas, the variance between these estimates and reality appears to be more than a matter of negligence or accident.

A feasibility study based on the actual consumption levels of City Gas' new customers both before and after they were taken from Consolidated shows that City Gas' extensions of its facilities to all but ten customers did not meet the company's feasibility criteria. Although documentation indicates that City Gas contemplated charging a contribution in aid of construction, no such contributions were collected. [Tr. 5–122–126]. City Gas' counsel agreed at trial that City Gas had waived some

$19,000 in contributions that should have been collected from Consolidated's customers under City Gas' feasibility rule. [Tr. 8–16, 26]. City Gas obtained the funds to expand into Consolidated's territory from the proceeds of its natural gas sales to other customers. [Tr. 3–208–209]. Thus, City Gas' other customers paid the costs of City Gas' expansion into Consolidated's service area because City Gas waived the necessary contributions.

J. *The Stay of This Lawsuit*

The present action was filed by Consolidated on April 22, 1983, seeking damages and an injunction to prohibit City Gas from engaging in any further efforts to block or delay Consolidated's access to natural gas. City Gas responded to the Complaint on May 16, 1983, by moving the Court to stay this lawsuit. Consolidated amended its Complaint on May 23, 1983, alleging that City Gas' motion to stay this suit was an additional act designed to delay Consolidated from obtaining judicial relief. On June 2, 1983, City Gas renewed its motion to stay in response to the Amended Complaint. This motion to stay remained pending and delayed the progress of this suit for almost one year, from May 16, 1983 until May 3, 1984, when United States District Judge Hastings, to whom this cause had been assigned originally, entered an order denying the motion.

K. *Consolidated's Damages*

The expert and lay testimony and documentary evidence presented at trial shows that City Gas' actions diminished Consolidated's value as a going concern by the amount of $1,503,975. [Tr. 6–67]. An industry and valuation expert, Mr. Ben Ball, whose testimony we have credited, derived this figure by determining Consolidated's net present value as a natural gas company with a competitively priced source of natural gas selling natural gas at City Gas' rates and possessing the same number of residential customers (1,995) and commercial customers (8) that it

averaged during the years 1981 and 1982. According to Mr. Ball's calculations, Consolidated's net revenue above variable costs would have been $128 per residential customer per year and $2,182 per commercial customer per year. [Tr. 6–69]. Using an interest rate of 10 percent and a term of 20 years, the net present value of the cash flow stream generated by each residential customer would have been $1,092; and the net present value of the cash flow stream generated by each commercial customer would have been $18,573. [Tr. 6–69]. These values per customer were then multiplied by the average number of customers in the 1981-1982 period. [Tr. 6–69].

From this total, Mr. Ball substracted approximately $100,000, representing the costs to Consolidated of the modifications necessary to its customers' appliances to accept natural gas ($50 per customer). [Tr. 6–69]. Mr. Ball next subtracted the present value of Consolidated's starting costs (approximately $500,000) and the cost of interconnecting the City Gas and Consolidated systems for resale or transportation of natural gas ($21,000). [Tr. 6–70.] On the basis of these calculations, Mr. Ball calculated that Consolidated's value as a natural gas company selling natural gas at City Gas' rates to the 1,995 residential and 8 commercial customers it had on an average during 1981 and 1982 would be approximately $1,705,000. [Tr. 6–71].

To this amount, Mr. Ball added $130,011, which represents the present value of seven commercial customers ($18,573 per customer) attached by City Gas during 1984 in the South Dade Shopping Center. [Tr. 6–73]. This shopping center is contiguous to the Consolidated system and consists of customers for which Consolidated did not have an opportunity to compete because it lacked a competitively priced supply of natural gas. Mr. Ball also added the present value of one new residential account ($1,092) that City Gas added to its system in September of 1985. [Tr. 6–73]. Accordingly, Consolidated's value including those seven

commercial customers and one residential customer to which City Gas is providing service in its area and for which Consolidated could not compete is approximately $1,836,000. [Tr. 6–73].

Next Mr. Ball calculated the additional value Consolidated would have because of its potential to grow at the rate of 6 percent per year. [Tr. 5–238–239]. Ball did not assume that Consolidated would obtain all of the 6 percent annual growth projected by Mr. David Starke, Plaintiff's population growth trend expert, for the areas adjacent to its system in the next 20 years. Instead, in calculating the value of Consolidated's growth potential, Ball assumed only that Consolidated itself would expand its existing system at the rate of 6 percent per year. [Tr. 6–75]. Taking into account the additional costs of expanding its system to new customers, Mr. Ball calculated the total added present value of Consolidated's growth potential to be approximately $438,000. [Tr. 6–75–77]. Based on these calculations, Mr. Ball concluded that Consolidated's value today as a natural gas firm, including the seven commercial accounts in the South Dade Shopping Center and the one residential account for which Consolidated never had the opportunity to compete, plus the present value of a 6 percent projected growth over 20 years, would be approximately $2,275,000. [Tr. 6–77].

Mr. Ball then proceeded to determine Consolidated's actual value today. Applying the market approach, he determined Consolidated's maximum value today to be $771,155. This value is the amount of the offer made by City Gas to Consolidated ($385 per existing customer). Mr. Ball considered this to be Consolidated's maximum value today. [Tr. 6–73–74]. He applied the market approach because City Gas' capacity to use its strategic location and resources to deny Consolidated natural gas and to take its customers had severely threatened Consolidated's continued existence, and would continue to do so. Accordingly, application of the

income approach that Mr. Ball used to calculate Consolidated's value in the absence of City Gas' actions would not provide a meaningful or accurate measure of Consolidated's present going concern value, as that approach assumes a reasonable likelihood of continued cash income. Furthermore, in view of these same circumstances, City Gas was the only potential buyer and could dictate its own price. Accordingly, someone purchasing Consolidated would succeed to Consolidated's present predicament and would ultimately be forced to sell to City Gas at a distress price. Thus, we agree that City Gas' $771,155 offer represents Consolidated's maximum value today. [*Id.*].

The diminution in Consolidated's value as a natural gas company as a result of City Gas' actions is the difference between what its value would have been in the absence of City Gas' actions ($2,275,130) and its value on the market today ($771,155). That difference is $1,503,975. [Tr. 6–78]. In addition to the diminution in Consolidated's going concern value, it has suffered lost profits in the form of revenues earned by City Gas from Consolidated's former customers. These lost profits were determined by calculating the total amount of gross revenues collected from these customers and by subtracting the cost of gas. Because City Gas incurs virtually no variable costs in serving these accounts, none were deducted. The amount of Consolidated's lost profits is $83,090.15 through September 30, 1985. [Tr. 5–130–133]. Therefore, we find Consolidated's total compensatory damages to be $1,587,065.15.

III. CONCLUSIONS OF LAW: CONSOLIDATED'S MONOPOLIZATION CLAIM

Plaintiff Consolidated has alleged that Defendant City Gas violated § 2 of the Sherman Act by monopolizing and attempting to monopolize the natural gasmarket in south Florida. We think Consolidated has sustained its burden. Our discussion of Consolidated's claim will be broken down into these component parts: (A) the relevant product

market; (B) the relevant geographic market; (C) monopoly power; (D) monopolistic intent; (E) the willful acquisition of monopoly power; (F) the willful maintenance of monopoly power; and (G) damages.

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570–71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966). To determine whether City Gas is liable for a § 2 violation, we must first define the relevant market.

A. *The Relevant Product Market*

The relevant product market consists of those products which are reasonably interchangeable with each other and for which there is a high "cross-elasticity of demand." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523–24, 8 L.Ed.2d 510 (1962). As the Supreme Court stated in *United States v. E.I. DuPont de Nemours & Co.*:

> In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce," monopolization of which may be illegal.

351 U.S. 377, 395, 76 S.Ct. 994, 1007, 100 L.Ed. 1264 (1956). The Supreme Court in *DuPont* made clear that the test is not one simply of "functional" interchangeability, but one of "reasonable" interchangeability, an analysis which necessarily embraces a variety of additional factors. As the Court stated, "[the] market is composed of products that

have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *Id* at 404, 76 S.Ct. at 1012. A necessary and vital component of reasonable interchangeability analysis therefore is price. This factor calls for an appraisal of cross-elasticity of demand. *Id.* at 394, 76 S.Ct. at 1007.

Numerous courts, relying on the *DuPont* test, have rejected the view that where products are merely functionally interchangeable, they automatically comprise the same market. For example, the court in *Borden, Inc. v. F.T.C.* stated:

> Borden's contention that fresh lemons and ReaLemon are reasonably interchangeable emphasizes the similarity of the end uses of the two products, and de-emphasizes other factors such as price differences, low cross-elasticity of demand, and quality differences between fresh lemons and ReaLemon. However, under *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956) (*Cellophane*), all of these factors are to be considered in assessing the reasonable interchangeability of products. It is now well established that monopoly power is equated with the power to control prices or exclude competition. As a consequence, in examining whether competition from other products prevents the possession of monopoly power, "[p]rice and competition are so intimately entwined that any discussion of theory must treat them as one." *Id.* at 392, 76 S.Ct. at 1005. In *Cellophane* the court discussed the reasonable interchangeability of products in terms of cross-elasticity of demand, and in terms of comparative costs of the products to consumers.

674 F.2d 498, 507 (6th Cir.1982) (footnotes omitted). Since there are possible substitutes for almost every product, the test of reasonable interchangeability is used to determine two things: (1) the products' use or uses, and (2) their

physical characteristics. In this manner, the total universe of possible substitutes may be ascertained for application of the cross-elasticity of demand test. The Supreme Court defined this process in *Times-Picayune Publishing Co. v. United States:*

> For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to *exclude* any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose "cross-elasticities of demand" are small.

345 U.S. 594, 612 n. 31, 73 S.Ct. 872, 882 n. 31, 97 L.Ed. 1277 (1953) (emphasis added).

To determine whether there is a high "cross-elasticity of demand" between two products, it is necessary to examine whether an increase in the price of one of the two products being considered for inclusion in the market would cause substantial substitution by its users of the other product under consideration. If substantial substitution takes place, then there is high "cross-elasticity of demand" and the products compete in the same market. If, however, a substantial price rise does not cause substantial substitution of the other product, there is low cross-elasticity of demand and the products do not compete in the same market. *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 713–14 (7th Cir.1979), *cert. denied*, 445 U.S. 917, 100 S.Ct. 1278, 64 L.Ed.2d 601 (1980).

The United States Department of Justice, in establishing enforcement guidelines in merger cases, has set forth a good common sense explanation of the process:

> Taking the product of the merging firm as a beginning point, the Department will establish a provisional product market. The Department will include in the provisional market those products that the merging

> firm's customers view as good substitutes at prevailing prices. The potential weakness of such a market based solely on existing patterns of supply and demand is that those patterns might change substantially if the prices of the products included in the provisional market were to increase. For this reason, the Department will test further and, if necessary, expand the provisional market. The Department will add additional products to the market if a significant percentage of the buyers of products already included would be likely to shift to those other products in response to a small but significant and non-transitory increase in price. As a first approximation, the Department will hypothesize a price increase of five percent and ask how many buyers would be likely to shift to the other products within one year. The Department will continue expanding the provisional market until it satisfies the general profitability standard stated above.

United States Department of Justice, Antitrust Division, Merger Guidelines, 47 Fed. Reg. 28,493, 28,494–95 (1982) (footnotes omitted).

Application of these principles has led us to conclude that the relevant product market in this case is composed solely of natural gas. Although natural gas and LP gas may both be used to fuel gas appliances with relatively inexpensive modifications to the appliances, it is undisputed that where natural gas is available, LP gas simply cannot compete because of its overwhelming price disadvantage. [Tr. 6–295–296]. On the demand side, the evidence is clear that a five percent increase in the price of natural gas would not cause consumers to substitute LP gas, as the price of the latter is already roughly 100% higher than the price of natural gas. That the prices for these products are so far apart is alone substantial evidence that they no longer compete in the same product market, as prices within a product market tend towards uniformity.

Accordingly, it is not surprising that there is little or no cross-elasticity of demand between LP gas and natural gas. This finding is unaltered by the fact that consumers in areas where natural gas becomes available substitute natural gas for LP gas. While this substitution is attributable to price in a broad sense, it is not the kind of price-sensitive substitution to which economists refer in defining market boundaries. Instead, it is simply recognition that where natural gas is available, LP gas is not a factor in the market because the price of natural gas simply renders LP gas obsolete.

Thus, we find that there is no cross-elasticity of demand between natural gas and LP gas. The relevant product market is comprised solely of natural gas. Even if we were to assume, however, that the relevant product market comprises both natural gas and LP gas, as City Gas has suggested, the result would remain wholly unchanged.

B. *The Relevant Geographic Market*

Both parties agree that the appropriate test for the determination of relevant geographic market is stated in *Tampa Electric Co. v. Nashville Coal Co.*:

> [T]he area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.

365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L.Ed.2d 580 (1961). In *Brown Shoe Co. v. United States*, the Supreme Court set forth the method by which the boundaries of relevant geographic markets may be established:

> The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. Moreover, just as a product submarket may have . . . significance as the proper "line of commerce" so may a geographic

> submarket be considered the appropriate "section of the country." Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both "correspond to the commercial realities" of the industry and be economically significant.

370 U.S. 294, 336–37, 82 S.Ct. 1502, 1530, 8 L.Ed.2d 510 (1962) (citations omitted).

The *Tampa Electric* and *Brown Shoe* tests clearly establish the relevant geographic market for natural gas in this case to include all of the territory given to City Gas in its agreement not to compete with People's Gas. [Tr. 6–299]. Indeed, both parties agree that Peoples' service area is not properly considered as part of the relevant geographic market in this case. [Tr. 9–163]. Rather, City Gas contends that the relevant geographic market includes only Consolidated's service area. We can find no economic significance to this proposed geographic area. We observe that City Gas' pipes have run through much of Consolidated's service area for quite some time, that City Gas was able to take customers away from Consolidated within its area, and that Consolidated's customers are quite able to turn to City Gas to purchase natural gas. Thus, it is readily apparent that potential purchasers look beyond Consolidated's service area for suppliers of natural gas. Moreover, City Gas, a company located outside of Consolidated's service area, supplies customers in Consolidated's service area with natural gas. Since the sellers within Consolidated's service area also operate outside of it and purchasers in Consolidated's service area turn to suppliers located outside of it, it is clear that the effective potential area of competition between City Gas and Consolidated is much broader than Consolidated's service area.

Under *Tampa Electric*, City Gas' market is the "market area in which the seller operates and to which the purchaser can practicably turn for supplies." This is true both at wholesale and at retail. Prior to obtaining a FERC allocation, Consolidated could turn to no one except City Gas to obtain wholesale natural gas, as no other supplier was physically close enough to Consolidated's system to make a connection economically feasible. [Tr. 3–19]. And retail customers in City Gas' service area, and in the as yet unserved portions of southwest Dade County, could turn to no one but City Gas for natural gas since Consolidated had none to offer. [Tr. 1–25].

Moreover, the relevant geographic market should encompass all of the service area City Gas serves, a substantial portion of Dade County and part of Broward County. The effects of demand and cost are spread throughout City Gas' service area through the rate regulation process. [Tr. 6–298]. Thus, City Gas can cross-subsidize prices or costs in any one part of its territory with revenues earned in the rest of its service area. Accordingly, we find that the relevant geographic market is composed of the areas in which Consolidated serves its existing customers, the entire region served by City Gas, and the as yet unserved portions of southwest Dade County.

C. *Monopoly Power*

Monopoly power is the "power to control prices or exclude competition." *United States v. Grinnell Corp.*, 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966) (quoting *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956)). Cases dealing with non-regulated industries have developed a number of analytic tools to aid in determining market power. Frequently courts have approached the problem by defining first the relevant product and geographic markets and then computing the defendants' market share from this statistical data. Where that data reveal a market share of

more than 70 to 80 percent, the courts have inferred the existence of monopoly power. In this case, the facts quite clearly show that City Gas had a market share in retail natural gas of at least 97% [Tr. 7-3], far above the threshhold for actual monopoly power. *See, e.g., American Tobacco Co. v. United States*, 328 U.S. 781, 797-98, 66 S.Ct. 1125, 1133-34, 90 L.Ed. 1575 (1946). Miller Gas, its only natural gas competitor, had a market share of 2.4%. [Tr. 7-3]. Measured by new "hookups" to serve customers, City Gas had 100% of the market in its service area. [Tr. 7-4]. In the wholesale market, City Gas sold 100% of the natural gas requested for resale in its service area. Moreover, even if we were to lump LP gas and natural gas in the same relevant product market, the record indicates that Defendant possessed monopoly power in that market too. Indeed, even considering sales of LP gas separately, Defendant sold some 4,436,984 therms of LP in 1982 compared to Consolidated's sale of only 542,170 therms. [Plaintiff's Ex. B-0011 (53 of 122); C-0062]. Finally, we observe that Defendant has failed to refute this definition of the relevant product market by any expert testimony.

However, "[r]eliance on statistical market share is a questionable approach in cases involving regulated industries. . . . A predominant market share may merely be the result of regulation, and regulatory control may preclude the exercise of monopoly power." *Southern Pacific Communications Co. v. American Telephone & Telegraph Co.*, 740 F.2d 980, 1000 (D.C. Cir.1984), *cert. denied*, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985); *see MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1106-07 (7th Cir.), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983); *Mid-Texas Communications Systems v. American Telephone & Telegraph Co.*, 615 F.2d 1372, 1386-87 (5th Cir.), *cert. denied*, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980); Watson & Brunner, *Monopolization by*

Regulated "Monopolies": The Search for Substantive Standards, 22 Antitrust Bull. 559, 565–68 (1977).

> In many regulated industries, each purveyor of service, regardless of absolute size, is in a monopoly position with regard to its customers. . . . For these reasons, the size of a regulated company's market share should constitute, at most, a point of departure in assessing the existence of monopoly power. Ultimately, that analysis must focus directly on the ability of the regulated company to control prices or exclude competition—an assessment which, in turn, requires close scrutiny of the regulatory scheme in question.

MCI Communications Corp., 708 F.2d at 1107 (footnote omitted). *See, e.g., Travelers Insurance Co. v. Blue Cross*, 361 F.Supp. 774, 780 (W.D.Pa.1972) (company was not a monopolist since it lacked control over rate-making mechanism), *aff'd*, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093, 94 S.Ct. 724, 38 L.Ed.2d 550 (1973); *Redwing Carriers, Inc. v. McKenzie Tank Lines, Inc.*, 443 F.Supp. 639, 641 (N.D.Fla. 1977), *aff'd*, 594 F.2d 114 (5th Cir.1979) (where price for transportation of item is set by regulatory agency, fact that one shipper may obtain a monopoly is irrelevant since price will be unaffected); *Nankin Hospital v. Michigan Hospital Service*, 361 F.Supp. 1199, 1209–10 & n. 33 (E.D.Mich.1973) (company does not possess monopoly power since rates are controlled and actively reviewed by state insurance commission).

The fact that a defendant may have had the largest share or the entire share of a market may not be sufficient alone to establish monopoly power if state or federal regulation prevented the defendant from having the power to restrict entry or control prices. *MCI Communications Corp.*, 708 F.2d at 1107. In short, we must also examine the realities of the regulatory scheme. *Southern Pacific Communications Co.*, 740 F.2d at 1001. If pricing and interconnection decisions are left to the defendant rather

than to the regulatory agency in the first instance, then it cannot fairly be said that a regulatory agency prevented a defendant from controlling price or excluding competition. *Id.* Additionally, costs and delays imposed by the regulatory process must be considered barriers to entry. *Id.* "The defendant's innocence or blameworthiness, however, has absolutely nothing to do with whether a condition constitutes a barrier to entry." *Id.*

Applying this regulatory analysis to the case at bar, we must consider in sum whether the overwhelming statistical evidence as to Defendant's monopoly power was rebutted by any evidence that City Gas was unable to control prices or exclude competition. City Gas adduced little evidence regarding the effects of regulatory agencies, if any, on its ability to control price or exclude competition. A review of the evidence presented by both parties has led us to conclude that City Gas did indeed have monopoly power.

First, although the FPSC approves City Gas' rates in the *wholesale market* for the resale of natural gas, City Gas, like AT & T, proposes the rates in the first instance, reaches an agreement with the buyer company, and then simply submits the agreement to the FPSC for its approval. Moreover, because Fla.Stat. § 366.03 (1985) states that natural gas utilities shall not be required to resell gas, it is unclear whether the FPSC could compel City Gas to sell at any particular rate. Second, FERC, the federal regulator of wholesale natural gas, does not control intrastate sales of natural gas. Thus, City Gas cannot rely on this regulator in asserting any sort of regulatory defense. Rather, it appears that City Gas was able to resell gas at will, essentially without regulatory intervention. We find on this record that City Gas had the power to control prices and exclude competition in the wholesale natural gas market.

As to the *retail market*, it is clear that the FPSC regulates City Gas' rates to customers and the entry of new suppliers into the retail natural gas market. However,

because a potential entrant into this market must obtain a natural gas supply first, from either FGT (after receiving a FERC allocation) or from City Gas, the fundamental realities of the situation are that City Gas has significant control over price and entrants to the retail market. This is further evidenced by the fact that the FPSC has approved two resale gas agreements to which City Gas is a party—one for one cent per therm over cost and one for seven cents per therm over cost—without any apparent reason for this disparity. These additional costs are then passed on to the consumer, suggesting that the fee City Gas sets is actually reflected in retail rates. This indicates that the regulatory scheme is structured in such a manner that at least some retail pricing decisions are made by City Gas in the first instance. We find that City Gas had substantial power to control prices in the retail natural gas market.

We also find, significantly, that City Gas had monopoly power due to the presence of high barriers to entry. Costs and delays imposed by the regulatory process are important barriers to entry. *Southern Pacific Communications Co.*, 740 F.2d at 1001. This issue was addressed in *United States v. American Telephone & Telegraph Co.*:

> [A] persuasive showing has been made that [AT & T has] monopoly power (wholly apart from FCC orders with respect to interconnection) through various barriers to entry, such as the creation of bottlenecks, entrenched customer preferences, the regulatory process, large capital requirements, access to technical information, and disparities in risk. These factors, in combination with the evidence of market shares, suffice at least to meet the government's initial burden, and the burden is then appropriately placed upon defendants to rebut the existence and significance of barriers to entry. On that basis, the defendants' regulatory defense to the government's claim of monopoly power must and will be rejected.

524 F.Supp. 1336, 1347–48 (D.D.C.1981) (footnotes omitted). The natural gas industry also presents any newcomer with the requirement of large initial capital outlays, lengthy construction programs and regulatory delays, such as those experienced by Consolidated in obtaining a natural gas allocation from the FERC. These entry barriers, combined with City Gas' overwhelming market share, compel a finding of monopoly power. Furthermore, although City Gas did not squarely assert a regulatory defense to monopoly power, we find, on the basis of the regulatory scheme evidence which was presented, that any such defense would be rejected. In sum, City Gas had monopoly power in the relevant market.

D. *Intent to Monopolize*

The existence of monopoly power in the relevant market, however, does not by itself prove the offense of actual monopolization. A monopolist's behavior is not unlawful unless the monopolist has engaged in the "*willful* acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966) (emphasis added). A general intent to monopolize is all that is ordinarily required in monopolization cases. *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 945, 92 L.Ed. 1236 (1948), *overruled on other grounds, Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). A specific intent to restrain competition or to achieve a monopoly is not required. *Id.* In unregulated settings, the precise dimensions of the general intent standard have been the subject of considerable litigation and varying formulas. *See United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295, 342 (D.Mass.1953), *aff'd per curiam*, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954). Some courts, building upon Judge Learned Hand's opinion in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir.1945), have

concluded that monopolistic conduct can be presumed from the possession of monopoly power unless the accused business demonstrates that its market power was "thrust upon it." *Id.* at 429. Under this approach, if the ordinary business conduct of a dominant firm leads to the acquisition or maintenance of monopoly power, that conduct is presumed to reflect the requisite monopolistic intent.

This approach, however, has been specifically rejected when attempting to identify monopolistic conduct by a regulated utility. *See, e.g., MCI Communications Corp.*, 708 F.2d at 1108; Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 Antitrust Bull. 559, 575–79 (1977). The rationale behind this finding is that in many regulated industries, anticipating and meeting all reasonable demands for service is a statutory obligation. *MCI Communications Corp.*, 708 F.2d at 1108. Consequently, "[t]o apply the *Alcoa* presumption to such conduct would be tantamount to holding that adherence to a firm's regulatory obligation could, by itself, constitute improper willfulness in a section 2 monopolization case." *Id.* Thus, at least one court has suggested that in cases involving a regulated utility the plaintiff must prove that each of the allegedly anticompetitive acts was done with the intent to maintain a monopoly in the relevant market. *Id.* One commentator, who also suggests that the *Alcoa* standard should be abandoned when dealing with regulated utilities, suggests that in developing an appropriate standard three concerns should be addressed: First, "conduct that implements a clearly articulated public policy against competition in a particular industry should not be the kind of exclusionary conduct that demonstrates willful monopolization." *Watson & Brunner, supra*, at 577. Second, actions or refusals to act (such as expanding facilities to meet anticipated growth in demand) required because of status as a public utility should not be deemed predatory conduct. *Id.* at 578. Third, reasonable actions legitimately taken by a regulated utility to protect its

ability to provide reliable service to its customers should not be deemed evidence of improper intent. *Id.* at 579. It is in the context of these concerns that the Seventh Circuit found that " 'something more than general intent should be required to establish a Sherman Act violation' " when dealing with a regulated utility. *MCI Communications Corp.*, 708 F.2d at 1108 (quoting *City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976, 985 (7th Cir.1980), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 892, 66 L.Ed.2d 824 (1981)).

In the instant case, as we shall discuss at length, certain aspects of the anticompetitive conduct at issue, we believe, are not regulated by any state or federal agency on a consistent basis. Consequently, it is unclear to us that we need go as far as the *MCI Communications Corp.* court in declaring that to establish intent, each allegedly anticompetitive act must be proven to have been done with the intent to maintain a monopoly. Nevertheless, we conclude that in fact this is the case. Thus, whether we apply a general intent standard, something "more than general intent," or indeed even a specific intent standard, we find that Consolidated has proven the requisite intent. As for the public utility concerns raised by Watson and Brunner, we address the first and third issues as defenses to the specific types of anticompetitive conduct to which they relate; the second issue is simply not anticompetitive conduct upon which our decision rests.

City Gas has demonstrated an intent to monopolize the relevant market through a number of individual acts and admissions of its intent. Principally, we shall address the following acts: (1) City Gas' 1960 territorial agreement whereby the parties agreed not to compete with each other in the sale of natural gas in Florida; (2) City Gas' refusal to sell or transport natural gas to Consolidated at a reasonable price; and (3) City Gas' efforts to acquire Consolidated in order to eliminate it as a potential competitor. We also

discuss the following acts which, we believe, when viewed together with the principal acts, are still further evidence of City Gas' intent to monopolize: (1) City Gas' use of its monopoly power to acquire Nationwide and Miramar, two small potential competitors; (2) City Gas' intervention in Consolidated's FERC proceeding to oppose Consolidated's application for a natural gas allocation; and finally (3) City Gas' use of price discrimination to take Consolidated's customers by not charging them City Gas' customary contribution in aid of construction to extend service to them.

E. *The Willful Acquisition of Monopoly Power: The Territorial Agreement*

The division of markets by competitors is a restraint of trade and is prohibited by § 1 of the Sherman Act. 2 Von Kalinowski, Antitrust Laws and Trade Regulations § 6F.01 (1986). The practice of allocating territories between competitors at the same level of the market structure (horizontal market division) is seen as having no purpose other than the elimination of competition and is deemed illegal per se. *See, e.g., United States v. Topco Associates*, 405 U.S. 596, 607–08, 92 S.Ct. 1126, 1133–34, 31 L.Ed.2d 515 (1972). For although courts generally utilize a "rule of reason" approach in evaluating the legality of restraints alleged to be violative of the Sherman Act, certain business relationships are considered to be so uniformly anticompetitive that they are deemed to be per se violations of the Sherman Act without regard to any consideration of their reasonableness. *Id.* at 607, 92 S.Ct. at 1133. Justice Black explained the need for per se rules:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the

> type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

Id. (quoting *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958)). "It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act." *Topco*, 405 U.S. at 607–08, 92 S.Ct. at 1133. One of the classic examples of a per se violation of § 1 of the Sherman Act is horizontal market division. *Id.* at 608, 92 S.Ct. at 1133–34. Moreover, if as a result of horizontal market division a company acquires monopoly power, it also violates § 2 of the Sherman Act. Such are the allegations in this case. *See United States v. Grinnell Corp.*, 384 U.S. 563, 576, 86 S.Ct. 1698, 1706–07, 16 L.Ed.2d 778 (1966).

As we have detailed already, in September 1960, Defendant City Gas entered into a territorial agreement with Peoples, which delineated distinct natural gas service areas for each of these principal competitors; each company bound itself not to compete in the other's territory. In accordance with its terms, the agreement was submitted by the parties to the Florida Public Utilities Commission (now the "FPSC"), which gave its formal approval and observed that such agreements were in the public interest and should be encouraged.

In 1962 Peoples filed a claim in circuit court alleging that City Gas had violated the 1960 agreement. City Gas responded by asserting, among other things, that the agreement was void as violative of Florida's antitrust laws and the Sherman Act. The case proceeded through the Florida state court system, and, in 1965, the Florida

Supreme Court upheld the agreement. *City Gas Co. v. Peoples Gas System*, 182 So.2d 429 (Fla.1965). The court concluded that the FPSC had adequate implied authority under Chapter 366, Florida Statutes, to validate such an agreement. *Id.* at 436. The court also found that Florida's antitrust laws were designed to prohibit only unreasonable restraints on trade, and that the public did not need the state's antitrust laws to protect it against this type of agreement because the public interest was adequately protected by Chapter 366, Florida Statutes. The court concluded that although the agreement could result in monopolistic control, the FPSC's statutory powers over the regulated companies were more than sufficient to prevent monopolistic pricing, production and quality of service. *Id.* at 435. In upholding the agreement, the court did not specifically address the applicability of the Sherman Act.

City Gas now claims that because the FPSC approved the territorial agreement and because the Florida Supreme Court upheld this agreement against an attack based on the Florida antitrust laws, the agreement is necessarily immune from attack under the federal antitrust laws. Defendant argues that its conduct here was reasonable, and authorized by the Florida Supreme Court, and therefore lawful. Its analysis ends with that point. While horizontal market division is normally considered a per se violation of the Sherman Act, the so-called "state action" exemption in fact will immunize certain types of conduct from antitrust liability. And while not squarely asserted by the Defendant beyond the citation of the Florida Supreme Court case, this issue is indeed a serious one requiring thorough analysis.

The state action doctrine exempts from antitrust liability acts by the state or those that bear a close relationship to state power or authority. The doctrine originated with *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In *Parker*, a state statute for marketing raisins restricted competition among growers and

maintained prices to packers. *Id* at 355, 63 S.Ct. at 315. An action was commenced against state officials seeking to enjoin them from enforcing the raisin marketing program. The Court held that the Sherman Act did not prohibit the state from imposing this restraint on competition since it was an act of government. The *Parker* decision was based on the principle of preemption. 6 Von Kalinowski, Antitrust Laws and Trade Regulations § 46.02 (1986). The critical issue was whether Congress, in enacting the Sherman Act, had intended to occupy the field of state-sanctioned anticompetitive activity. *Id.* The Supreme Court concluded that it had not, and thus that the legislative interests of the states had to be accommodated. 317 U.S. at 352, 63 S.Ct. at 314.

The *Parker* doctrine has evolved in recent years through a number of cases. Two requirements for state action immunity have emerged: *first*, the anticompetitive conduct must be undertaken pursuant to a clearly articulated and affirmatively expressed policy of the state to displace competition; and, *second*, the anticompetitive conduct must be actively supervised by the state. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97,100 S.Ct. 937, 63 L.Ed.2d 233 (1980).[2] This test applies to

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[2]In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, a wine distributor challenged California's resale price maintenance and price posting statutes for the wholesale wine trade as violative of the Sherman Act. 445 U.S. 97, 99, 100 S.Ct. 937, 940 63 L.Ed.2d 233 (1980). The Court stated that its decisions had established two standards for antitrust immunity under *Parker v. Brown*. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Id.* at 105, 100 S.Ct. at 943 (citation omitted). The Court found that the legislative policy in *Midcal Aluminum* forthrightly stated its purpose to permit resale price maintenance; accordingly, the first standard had been met. The program, however, did not meet the second requirement for *Parker* immunity because "[t]he State simply authorizes price-setting and enforces the prices established by private

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actions brought against private parties as well as those brought against the state officials who implement the conduct. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56–57, 105 S.Ct. 1721, 1726–27, 85 L.Ed.2d 36 (1985).[3]

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parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program." *Id.* at 105–06, 100 S.Ct. at 943 (footnote omitted). Without such supervision, the Court found that the plan was subject to the antitrust laws.

[3]In *Southern Motor Carriers Rate Conference, Inc. v. United States*, the most recent Supreme Court case to address this issue, private carriers formed a rate bureau that submitted joint proposals on rates to state regulatory agencies. 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). State laws permitted joint proposals but did not require them. 471 U.S. at 50, 105 S.Ct. at 1723. The Supreme Court held that the activity was immune from antitrust attack. *Id.* at 66. 105 S.Ct. at 1731–32. The Court reasoned that *Parker* did not require compulsion because *Parker* was an attempt to reconcile state displacement of competition with federal antitrust goals, and requiring compulsion would force a higher degree of state anticompetitive conduct. *Id.* at 61, 105 S.Ct. at 1729.

Southern Motor Carriers, however, presented the Court with one unusual twist. For although the North Carolina, Georgia and Tennessee statutes expressly permitted collective ratemaking, Mississippi's statutes did not specifically address collective ratemaking. *Id.* at 63, 105 S.Ct. at 1730. The Court noted that Mississippi did give its public service commission the authority to regulate common carriers and the power to prescribe just and reasonable rates. From this the Court reasoned as follows:

> The legislature thus made clear its intent that intrastate rates would be determined by a regulatory agency, rather than by the market. The details of the inherently anticompetitive ratesetting process, however, are left to the agency's discretion. The State Commission has exercised its discretion by actively encouraging collective ratemaking among common carriers. We do not believe that the actions petitioners took pursuant to this regulatory program should be deprived of *Parker* immunity.

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The rules of state action may be summarized as follows. When a state acts in its soverign capacity, its actions are immune from federal antitrust scrutiny. *Parker*, 317 U.S. at 352, 63 S.Ct. at 314 (act of state legislature is act of state). "[W]hen a state legislature adopts legislation, its actions constitute those of the State. . . ." *Hoover v. Ronwin*, 466 U.S. 558, 567–68, 104 S.Ct. 1989, 1995, 80 L.Ed.2d 590 (1984).[4] Additionally, "a state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature." *Id.* at 568, 104 S.Ct. at 1995. *See Bates v. State Bar*, 433 U.S. 350, 359–63, 97 S.Ct. 2691, 2696–98, 53 L.Ed.2d 810 (1977) (state supreme court rule that restricted

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Id. at 63–64, 105 S.Ct. at 1730 (citation omitted). Accordingly, since the proposals were submitted pursuant to statutes which permitted collective ratemaking or pursuant to a statute which clearly articulated the state's intent to displace price competition among carriers with a regulatory structure, the first prong of the *Midcal Aluminum* test was met. The second prong of the *Midcal Aluminum* test was conceded. *Id.* at 66, 105 S.Ct. at 1731.

[4]In *Hoover v. Ronwin*, an unsuccessful candidate for the bar alleged that the Committee on Examinations and Admissions had set grading criteria to limit the entrance of new attorneys rather than to measure their competence. 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984). The Supreme Court held that the action of the Committee was immune because the action of the Committee was that of the state itself. *Id.* at 570, 104 S.Ct. at 1996. The Court reasoned that "although the Arizona Supreme Court necessarily delegated the administrati n of the admissions process to the Committee, the court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona." *Id.* at 573, 104 S.Ct. at 1998. As a result, the Court found it unnecessary to address whether the policy was clearly articulated and affirmatively expressed state action. *Id.* at 569, 104 S.Ct. at 1995. The Court further stated that if the same activity had been carried out by private parties pursuant to state authorization, then the two-part *Midcal Aluminum* test would have been applied to ensure that the conduct was contemplated by the state. *Id.* at 568–69, 104 S.Ct. at 1995–96.

advertising by lawyers is act of state).[5] *Contra Goldfarb v. Virginia State Bar*, 421 U.S. 773, 775, 793, 95 S.Ct. 2004, 2007, 2016, 44 L.Ed.2d 572 (1975) (enforcement by state bar of county bar's minimum fee schedule for lawyers is not act of state).[6] When a state acts in its sovereign capacity, it is unnecessary to apply the two-pronged *Midcal Aluminum* test; the act is simply immune from the antitrust laws.

But when the anticompetitive activity is carried out by private parties pursuant to state authorization, which includes authorization by a state agency, *both* parts of the *Midcal Aluminum* test must be satisfied. *Southern Motor Carriers*, 471 U.S. at 60–63, 105 S.Ct. at 1728–30. "This

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[5]In *Bates v. State Bar of Arizona*, as a part of its regulation of the bar, the Arizona Supreme Court had promulgated a rule against advertising by lawyers. 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). The Supreme Court upheld the rule because it was the "affirmative command" of the Arizona Supreme Court which had adopted, supervised and enforced the rule, thereby acting as sovereign. The Court deemed it significant that the "state policy [was] so clearly and affirmatively expressed and that the State's supervision [was] so active." *Id.* at 362, 97 S.Ct. at 2698.

[6]In *Goldfarb v. Virginia State Bar*, a case that involved the publication of a minimum fee schedule for lawyers of that state's bar, the Court found that mere enforcement by the state bar of a county bar association's minimum fee schedule was not the act of the state as sovereign even though the bar was a state agency for some purposes. 421 U.S. 773, 790–91, 95 S.Ct. 2004, 2014–15, 44 L.Ed.2d 572 (1975). The Court stated that the anticompetitive activities were not "*compelled* by direction of the State acting as a sovereign." *Id.* at 791, 95 S.Ct. at 2015 (emphasis added). The Court looked to state statutes and state supreme court ethical opinions and found no evidence of compulsion. *Id.* at 790–91, 95 S.Ct. at 2014–15. This compulsion requirement was only renounced recently by the Supreme Court in *Southern Motor Carriers*. Even without the compulsion requirement, however, it has been suggested that the result in *Goldfarb* would not differ. *Southern Motor Carriers Rate Conference, Inc.*, 471 U.S. at 61, 105 S.Ct. at 1729. For although the State Bar was empowered to oversee the practice of law, it is unlikely that the state intended price fixing to be one of its specific powers. *See* Lopatka, State Action and Municipal Antitrust Immunity: An Economic Approach, 53 Fordham L.Rev. 23, 39–40 (1984). Thus, *Goldfarb* still would not meet the first prong of the *Midcal Aluminum* test for state action immunity.

requirement insures that the anticompetitive conduct be actually intended by the state as part of its regulatory scheme." 6 Von Kalinowski, Antitrust Laws and Trade Regulation § 46.04[3] (1986). *See Southern Motor Carriers*, 471 U.S. at 65–66, 105 S.Ct. at 1731 (collective ratemaking via state public service commissions, permitted by statute in three states and permitted pursuant to clearly articulated state policy in fourth state, is immune from the antitrust laws); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 412, 58 L.Ed.2d 361 (1978) (state agency's decisions were outside reach of antitrust laws because state statute's regulatory scheme was clearly articulated and designed to displace competition in the relevant area).[7] *Contra Midcal Aluminum*, 445 U.S. at 105–06, 100 S.Ct. at 943 (although legislative policy clearly articulated purpose to permit resale price maintenance, the program was not immune from the antitrust laws due to inadequate state supervision); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 584–85, 96 S.Ct. 3110, 3114–15, 49 L.Ed.2d 1141 (1976) (electric utility's free light bulb tariff which was approved by public service commission was not exempt from the antitrust laws because there was no evidence of any state policy or statute relating to light bulbs).[8]

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[7]In *New Motor Vehicle Board v. Orrin W. Fox Co.*, the Court reviewed a state law (the Automobile Franchise Act) which gave an existing auto dealership the right to petition a state agency if a manufacturer attempted to create a new dealership in the same area. 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978). The state agency could refuse to allow the new franchise. The Court held that the decisions of the agency were outside the reach of the antitrust laws because the Act's regulatory scheme was "a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.* at 109, 99 S.Ct. at 412.

[8]The Court addressed anticompetitive activity carried out by private parties in *Cantor v. Detroit Edison Co.*, where the Supreme Court held that a public utility's program of distributing free light bulbs to customers

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In the instant case, the territorial agreement was approved by a state agency, possibly pursuant to Chapter 366, Florida Statutes. The restraint was not approved by a state legislature or by the state supreme court acting as sovereign. Consequently this conduct must satisfy both parts of the *Midcal Aluminum* test in order for it to be immune from the antitrust laws. We must decide whether the FPSC, a nonsovereign state agency, acted pursuant to a clearly articulated and affirmatively expressed state policy in approving the territorial agreement, *and* whether such agreements are actively supervised by the FPSC.

1. *The First Prong: No Clearly Articulated State Policy*

The FPSC derives its power from Chapter 366, Florida Statutes. This Chapter defines a public utility to include any supplier of gas—natural, manufactured or similar gaseous substance—with exceptions which are not relevant here except that, notably, a person supplying LP gas is not a public utility. Fla.Stat. § 366.02 (1985). The powers of the FPSC with respect to public utilities are enumerated in § 366.05. They include the following powers:

> (1) In the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility; to

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was not immune from antitrust attack despite the fact that the program was set forth in a tariff approved by the state. 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976). The Court stated that the state's participation in adopting and implementing the anticompetitive conduct must be dominant in order to immunize such conduct from the Sherman act. In this case there was no statute authorizing the regulation of light bulbs; indeed, there was no evidence of any state policy relating to light bulbs. *Id.* at 584–85, 96 S.Ct. at 3114–15. Therefore, the Court found that this conduct was not immunized from the Sherman Act.

require repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto; to employ and fix the compensation for such examiners and technical, legal, and clerical employees as it deems necessary to carry out the provisions of this chapter; and to prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this chapter.

Conspicuously absent from this broad list of powers is *any* reference to establishment of territories or resolution of territorial disputes. However, as noted in *Southern Motor Carriers*:

> A private party acting pursuant to an anticompetitive regulatory program need not "point to a specific, detailed legislative authorization" for its challenged conduct. Lafayette v. Louisiana Power & Light Co., *435 U.S. [389], at 415 [98 S.Ct. 1123, at 1138, 55 L.Ed.2d 364 (1978)](opinion of BRENNAN, J.). As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the* Midcal *test is satisfied. . . .*
>
> If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness. Cf. *Hallie v. Eau Claire* [471 U.S. 34], *ante*, at 44 [105 S.Ct. 1713, at 1719, 85 L.Ed.2d 24 (1985)]

> (requiring explicit legislative authorization of anticompetitive activity would impose "detrimental side effects upon municipalities' local autonomy"). Therefore, we hold that if the State's intent to establish an anticompetitive regulatory program is clear, as it is in Mississippi, the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws.

471 U.S. at 64–65, 105 S.Ct. at 1731 (footnote omitted).

It is clear from Chapter 366 that the Florida legislature intended to substitute competition between public utilities for a regulatory program which would include foreseeable anticompetitive effects. This is particularly clear from the list of powers which the FPSC has over public utilities. Although the focus of the list seems to be on rates, it includes quality of service and repair language as well.

The case presently before this Court may be in some measure analogous to *Southern Motor Carriers*. In *Southern Motor Carrriers*, the public service commission had broad authority to prescribe rates but lacked specific authority to allow collective ratemaking. The Court held that specific authority was not necessary because the legislature intended that rates would be set by a regulatory agency, and that collective ratemaking was just one detail of this inherently anticompetitive ratesetting process. 471 U.S. at 63–64, 105 S.Ct. at 1730–31. Arguably, the same could be said about Florida's ratemaking structure. Nevertheless, we are convinced that the power to authorize territorial agreements, which by their purpose and effect exclude competition within defined geographic boundaries, is not simply a detail of the FPSC's explicit authority to regulate rates, or to require repairs and improvements, or to hire employees or fix compensation for examiners. Moreover, there is nothing unforeseeable about the creation or regulation of territorial agreements not to compete in regulated industries such as

this one. This is particularly true where, as we note below, the Florida legislature has *expressly* and *affirmatively* given the FPSC the power to establish and regulate exclusive territories in such related public utilities as the telephone industry, water and sewer utilities, and rural electric cooperatives. The most that can be said here is that territorial agreements, although not mentioned at all in Chapter 366 as to natural gas utilities, have an undisputable effect upon rates. In one FPSC order which addressed proposed tariffs and the resolution of a natural gas territorial dispute, the FPSC analyzed how each company's rate of return would be affected if it received or lost the territory in question. *In re: Tariff filed by Miller Gas Company* and *In Re: Petition of City Gas Company*, Docket Nos. 850115–GU, 850118–GU, Order No. 15268, 85 FPSC 10:205 (October 18, 1985). The FPSC noted that loss of the customer "would force Miller to seek significant increases in the rates to its residential and commercial customers." *Id.* at 3.

"Agency approval may be undoubted in fact, clearly authorized by state law, and yet not constitute an expression of state policy that is meant to be contrary to the federal antitrust laws." 1 P. Areeda & D. Turner, Antitrust Law ¶ 214b (1978). One method which commentators have suggested to determine legislative intent is the "central purpose" test. *Id.* at ¶ 214b4. Professors Areeda and Turner have noted that the primary objective of most state public utility regulations is the prevention of consumer exploitation by the regulated industry. Thus agency approval might mean that in the agency's judgment consumers are not injured by the practice, rather than that the practice is necessary to increase consumer welfare. In reviewing the instant territorial agreement, however, it is clear that the FPSC thought that the agreement was necessary to increase consumer welfare. The FPSC has stated numerous times that territorial agreements are in the public interest because they "will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and

facilities. . . ." Order No. 2948, Docket No. 6081-EU; *see, e.g., Re Florida Power Corporation*, 78 P.U.R.3d 411, 412 (FPSC 1969); *Re Florida Power & Light Co.*, 71 P.U.R.3d 362, 364 (FPSC 1967). Consequently, an application of the central purpose test at least suggests that territorial agreements may be part of the FPSC's central purpose in regulating the natural monopoly characteristics of natural gas.

There is, however, powerful contrary authority which leads us to the conclusion that the legislature did not intend to give the FPSC the power to approve territorial agreements between natural gas companies. In the first place, in other Florida statutes dealing with specific utilities, the legislature affirmatively gave the FPSC the power to establish exclusive territories for telephone companies (Fla.Stat. § 364.335-.337),[9] and water and sewer utilities

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[9]The relevant portion of Fla.Stat. § 364.335 (1985) provides as follows:

Application for certificate.

(1) Each application for a certificate shall: (a) Provide all information required by rule or order of the commission, which may include a detailed inquiry into the ability of the applicant to provide service, a detailed inquiry into the territory and facilities involved, and a detailed inquiry into the existence of service from other sources within geographical proximity to the territory applied for.

. . . .

(4) The commission may grant a certificate, in whole or in part or with modifications in the public interest, but in no event granting authority greater than that requested in the application or amendments thereto and noticed under subsection (1); or it may deny a certificate. The commission shall not grant a certificate for a proposed telephone company, or for the extension of an existing telephone company, which will be in competition with or duplicate the local exchange services provided by any other telephone company unless it first determines that the existing facilities are inadequate to meet the reasonable needs of the public and it first amends the certificate of such other telephone company to remove the basis for competition or duplication of services. The commission may, however, grant such a certificate for a proposed telephone company,

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(Fla.Stat. § 367.041–.055),[10] and to resolve territorial disputes

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which will be providing competitive or duplicative pay telephone service only without determining that existing facilities are inadequate to meet the reasonable needs of the public and without amending the certificate of another telephone company to remove the basis for competition or duplication of services. Pay telephone service shall include that telephone service using telephones that are capable of accepting payment by specie, paper money, or credit cards.

Fla.Stat. § 364.337 (1985) provides as follows:

Duplicative or competitive services.

(1) When the commission grants a certificate to a telephone company for any type of service that is in competition with or that duplicates the services provided by another telephone company, the commission, if it finds that such action is consistent with the public interest, may:

(a) Prescribe different requirements for the company than are otherwise prescribed for telephone companies; or

(b) Exempt the company from some or all of the requirements of this chapter.

(2) In determining whether the actions authorized by subsection (1) are consistent with the public interest, the commission shall consider:

(a) The number of firms providing the service;

(b) The geographic availability of the service from other firms;

(c) The quality of service available from alternative suppliers;

(d) The effect on telephone service rates charged to customers of other companies; and

(e) Any other factors that the commission considers relevant to the public interest.

(3) Each amount paid by an interexchange telephone company to a telephone company providing local service for use of the local network shall be deducted from gross operating revenues for purposes of determining the amount of the regulatory fee assessed the interexchange telephone company pursuant to s. 350.113.

[10]The relevant portion of Fla.Stat. § 367.041 (1985) provides as follows:

Application.

Each applicant for a certificate shall:

(1) Provide information required by rule or order of the commission, which may include a detailed inquiry into the ability of the applicant to provide service, the territory and facilities involved, the need for service in the territory involved, and the existence or non-existence of

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service from other sources within geographical proximity to the territory applied for;. . . .

The relevant portion of Fla.Stat. § 367.051 (1985) provides as follows: Issuance of certificate.

. . . .

(2) If, within 20 days following the official date of filing, the commission receives from the public counsel or a governmental agency, or from a utility or consumer who would be substantially affected by the requested certification, a written objection requesting a proceeding pursuant to s. 120.57, the commission shall order such proceeding conducted in or near the territory applied for, if feasible. Notwithstanding the ability to object on any other ground, a county or municipal government has standing to object on the ground that the issuance of the certificate will violate established local comprehensive plans developed pursuant to ss. 163.3161–163.3211. If any consumer, utility, or governmental agency or the public counsel requests a public hearing on the application, such hearing shall, if feasible, be held in or near the territory applied for; and the transcript of such hearing and any material submitted at or before the hearing shall be considered as part of the record of the application and any proceeding related thereto.

(3)(a) The commission may grant a certificate, in whole or in part or with modifications in the public interest, but may in no event grant authority greater than that requested in the application or amendments thereto and noticed under s. 367.041, or it may deny a certificate. The commission shall not grant a certificate for a proposed system, or for the extension of an existing system, which will be in competition with, or a duplication of, any other system or portion of a system, unless it first determines that such other system or portion thereof is inadequate to meet the reasonable needs of the public or that the person operating the system is unable, refuses, or neglects to provide reasonably adequate service.

The relevant portion of Fla.Stat. 367.055 (1985) provides as follows: Application for deletion of territory.

(1) Each applicant for deletion of territory shall:

(a) Provide the information required by rule or order of the commission, which may include a detailed inquiry into the ability or lack of ability of the applicant to provide service, the need or lack of need for service in the territory sought to be deleted, and the existence or non-existence of service from other sources within geographical proximity to the territory sought to be deleted.

between rural electric cooperatives (Fla.Stat. § 366.04).[11] By virtue of the fact that the legislature specifically addressed these utilities, it can be implied, as a sound rule of statutory construction, that it would have included such a provision for natural gas companies if it had intended to delegate such powers. *See, e.g., J. Ray McDermott & Co. v. Vessel Morning Star*, 457 F.2d 815, 818 (5th Cir.), *cert. denied*, 409 U.S. 948, 93 S.Ct. 271 & 292, 34 L.Ed.2d 218 (1972) ("Where Congress has carefully employed a term in one place but excluded it in another, it should not be implied where excluded."); *State Highway Commission v. Volpe*, 479 F.2d 1099, 1114 (8th Cir.1973) ("[w]here Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power.' " (citations omitted)); *Western States Newspapers, Inc. v. Gehringer*, 203 Cal.App.2d 793, 22 Cal.Rptr. 144 (1962); 2A Sutherland Stat. Const. § 51.02 (4th ed. 1984); *see also Shell Oil Co. v. Federal Energy Administration*, 400 F.Supp. 964, 968 (S.D.Tex.1975), *affd*, 527 F.2d 1243 (Temp.Emerg.Ct.App.1975) ("An intentional omission of a word is evidence that Congress did not intend to grant a

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[11]The relevant portion of Fla.Stat. 366.04 (1985) provides as follows: Jurisdiction.

. . . .

(d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. However, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements.

(e) To resolve any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

power which the inclusion of the word would have given." (citations omitted)).

Furthermore, in a recent FPSC Order, the FPSC itself questioned its authority to resolve territorial disputes between natural gas companies but decided the Petitions before it without reaching this issue. *In re: Tariff filed by Miller Gas*, 85 FPSC 10:205 at 5–6 (October 18, 1985). The FPSC stated:

> It is not clear that this Commission has the statutory authority to either establish exclusive service territories for natural gas utilities (as it does for telephone, water and sewer utilities) or resolve territorial disputes between natural gas utilities (as specifically authorized for electric utilities). However, our resolution of this question is not necessary in view of our finding that Miller is the appropriate utility to serve WASA's natural gas requirements for both the water pumps and the lime kiln.

Id. This authority seems to provide an even stronger indication that the Florida legislature did not intend to give the FPSC the power to approve territorial agreements between natural gas companies. Moreover, a review of FPSC decisions regarding this territorial agreement shows that the FPSC has known for at least 14 years that this agreement might violate the federal antitrust laws. *See In re: Investigation of Territorial Agreement Between Peoples Gas System and City Gas Co.*, Order No. 5495, Docket 7204–GU (July 25, 1972), as modified by Order No. 5800 (July 11, 1973). Despite its initial concern, however, on rehearing, the FPSC distinguished the cases which had found territorial agreements to be violative of the antitrust laws and reaffirmed its position that it had the authority to approve these agreements. Notably, the FPSC stated that *City Gas* contended "that due to recent legal developments it is now clear that the territorial agreement is invalid under the federal anti-trust law and that this Commission should

not put itself in the position of ordering the Respondents to continue to adhere to an unlawful agreement." Order No. 5495 at 2.

Of particular significance is the authority the FPSC cites as the source of its power to approve territorial agreements. It cites not Chapter 366 or any other state statute, but the Florida Supreme Court's decision in *City Gas Co. v. Peoples Gas System*, 182 So.2d 429 (Fla.1965). Indeed, the FPSC has cited this case for this proposition in numerous cases involving territorial agreements. *See, e.g., Re Florida Power Corp.*, 78 P.U.R.3d 411, 412 (FPSC 1969); *Re Florida Power & Light Co.*, 71 P.U.R.3d 362, 364 (FPSC 1967). State supreme court authority, however, does not form the basis for a clearly articulated state policy except when the court acts in its legislative capacity. In the *City Gas Co.* case relied upon, the Florida Supreme Court was acting in its judicial capacity; it did not by affirmative command adopt, supervise and enforce its own rule. Consequently, this decision cannot form the basis for state action immunity. For the same reason, the other Florida Supreme Court cases which uphold territorial agreements and are cited by Defendant are not controlling. *See, e.g., Storey v. Mayo*, 217 So.2d 304 (Fla.1968), *cert. denied*, 395 U.S. 909, 89 S.Ct. 1751, 23 L.Ed.2d 222 (1969); *Peoples Gas System v. Mason*, 187 So.2d 335 (Fla.1966).

Being mindful that *Midcal Aluminum* requires that the FPSC act pursuant to a clearly articulated and affirmatively expressed state policy, we cannot say that such a policy exists in view of the legislature's specific grant of similar power to the FPSC with regard to other utilities and the pronounced absence of such an express grant with respect to natural gas companies. While in the absence of these legislative enactments such a position might at least be arguable in light of *Southern Motor Carriers*, when these enactments are considered, as we think they must be, we do not think that even under the most liberal reading of

Southern Motor Carriers that a *clearly* articulated state policy to allow approval of territorial agreements by the FPSC can be found.

It is not for the federal courts to question why a state legislature chooses to state expressly a policy regarding territorial agreements as to some utilities and not as to others. Rather, it is for us to note only that such a clearly expressed state policy does not exist in Florida as to natural gas territorial agreements. If the Florida legislature wishes to establish such a policy, it is free to do so. But for us to imply that the legislature intended to make such a statement about so important a matter would create the kind of interference with state sovereignty which *Parker* was intended to prevent.

2. *The Second Prong: Absence of Active Supervision of Territorial Agreements*

Turning to the second part of the *Midcal Aluminum* test, the issue becomes whether the FPSC actively supervised territorial agreements between natural gas companies. "[T]he adequate supervision criterion ensures that state-federal conflict will be avoided in those areas in which the state has demonstrated its commitment to a program through its exercise of regulatory oversight. At the same time, it guarantees that when the Sherman Act is set aside, private firms are not left to their own devices." 1 P. Areeda & D. Turner, Antitrust Law ¶ 213a (1978). In order to meet this test, supervision does not have to be rigorous. *Id.* at ¶ 213c. An allegation "that state officials customarily 'rubber stamp' the self-interested decisions or recommendations of the private parties involved should not ordinarily oust *Parker* immunity." *Id.* However, in situations where a regulated firm submits tariffs to an agency, and the tariffs take effect unless the agency disapproves them, *Parker* immunity will not lie. *Id.* at ¶ 213f. Agency inaction will not satisfy the active supervision requirement.

A few cases have addressed how much supervision is adequate. At one end of the spectrum is *Midcal Aluminum* where the state simply enforced the prices established by private parties. 445 U.S. at 105–06, 100 S.Ct. at 943. The Court held that this did not meet the requirement of active supervision. Some supervision was required in *Coin Call, Inc. v. Southern Bell Telephone & Telegraph Co.*, where the court found that even assuming the coin telephone tariff was in large measure produced by defendant's initiative, that it met the second prong of *Midcal* because the PSC actively enforced the original tariff and participated in its revision. 636 F.Supp. 608, 614 (N.D.Ga.1986). In another case, a district court found that a city did not actively supervise a private company to whom it had granted the exclusive right to perform electrical inspections where the city exercised control over standards, methods and/or practices employed by the private company in its inspections but maintained no control over the private party's fees. *Englert v. City of McKeesport*, 637 F.Supp. 930, 933 (W.D.Pa.1986). Last, in *Tambone v. Memorial Hospital*, a court found that hospital peer review actions were not actively supervised by the state. 636 F.Supp. 508, 514–15 (N.D.Ill.1986). The court stated that although the Department of Health had access to peer review materials, inspectors were not obligated to inspect these materials. Thus, there was no regular organized supervision of the peer review process.

Little evidence of the FPSC's supervision of territorial agreements was adduced during this trial. It is clear that territorial agreements are not required to be submitted to the FPSC to become effective, but that when they are submitted, the FPSC will act upon them. It also appears from a review of FPSC orders regarding this agreement, that the FPSC enforces the agreement or considers its revision, after a hearing, *only* when someone complains to it or petitions for a review of the agreement. The FPSC does not review the agreement on its own initiative. Thus, as the FPSC seems to supervise territorial agreements only on a

sporadic basis, the FPSC does not appear to have met even the less rigorous *Coin Call, Inc.* adequate supervision standard. Unlike the situation in *Coin Call, Inc.*, we have been presented with no evidence that the FPSC *actively* enforces the territorial agreements it approves, or that it participates in the revision of such agreements. If we apply the more rigorous *Englebert* or *Tarbone* standard, the FPSC definitely would not be seen as engaging in active supervision. There is no evidence that the FPSC has established any standards for the creation of territorial agreements or that territorial agreements are reviewed on a regular basis in the absence of a petition by a party or utility customer for reconsideration. On this record, we find that the FPSC does not adequately supervise natural gas territorial agreements and accordingly, we must conclude that the second prong of the *Midcal Aluminum* test has not been met.

Because we have found that City Gas has monopoly power in the relevant market, and that it acquired that power by virtue of a territorial agreement that was not immune from the scope of the antitrust laws, we conclude that City Gas has violated § 2 of the Sherman Act. For in the absence of state action immunity, a territorial agreement, even one between regulated utilities, is a per se violation of the Sherman Act. *See, e.g., Gainesville Utilities Department v. Florida Power & Light Co.*, 573 F.2d 292, 299–300 (5th Cir. 1978), *cert. denied*, 439 U.S. 966, 99 S.Ct. 454, 58 L.Ed.2d 424 (1978); *Pennsylvania Water & Power Co. v. Consolidated Gas, Electric, Light & Power Co.*, 184 F.2d 552, 558 (4th Cir.), *cert. denied*, 340 U.S. 906, 71 S.Ct. 282, 95 L.Ed. 655 & 656 (1950); *accord Montana-Dakota Utilities Co. v. Williams Electric Cooperative*, 263 F.2d 431 (8th Cir.1959).

F. *The Willful Maintenance of Monopoly Power: Refusals to Deal; Other Predatory Acts*

Consolidated also has contended that City Gas' failure to negotiate in good faith a reasonable rate for natural gas sales or transportation amounts to an illegal refusal to deal in violation of § 2 of the Sherman Act. We agree and conclude that Defendant's refusal to deal with Plaintiff in the context of this case is an even more compelling and altogether indedendent basis to sustain a finding that § 2 has been violated.

In general there exists no duty to deal, so long as the decision not to deal is made unilaterally. *See, e.g., Associated Press v. United States*, 326 U.S. 1, 14–15, 65 S.Ct. 1416, 1421–22, 89 L.Ed. 2013 (1945); *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468, 65 L.Ed. 992 (1919). This rule was enunciated by the Supreme Court: "In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." 250 U.S. at 307, 39 S.Ct. at 468. Where a firm is a monopolist, however, additional obligations are imposed which would not attach in the ordinary refusal to deal context. *Byars v. Bluff City News Co.*, 609 F.2d 843, 855 (6th Cir.1979). Consequently, Section 2 violations have been found where a firm with monopoly power at one level of the distribution chain refuses to deal with competitors at another level of the distribution chain, in order to drive these companies out of business so that the monopolist can integrate vertically and achieve a monopoly at both levels. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *MCI Communications Corp.*, 708 F.2d 1081.

There are two distinct lines of cases which have imposed a duty to deal upon a monopolist—the "essential facilities" doctrine, or "bottleneck" theory, and the "intent" test.

Under either theory we think Plaintiff has proven a violation of § 2.

1. *The Essential Facilities Doctrine*

To begin with, the essential facilities doctrine teaches that, when a business controls a scarce facility, it assumes an obligation to provide its competitors reasonable access to that facility. *Byars*, 609 F.2d at 856. A refusal to deal in this context may be unlawful because it could result in the monopolist extending its power vertically from one level of production to another. *MCI Communications Corp.*, 708 F.2d at 1132. The doctrine originated with *United States v. Terminal Railroad Association*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912), where a group of railroads acquired ownership over the only feasible terminal for rail traffic coming to St. Louis from the West. The Supreme Court ruled that the terminal owners had to make the facility equally accessible to all users. Over the years, the doctrine has been applied in a variety of contexts. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973) (utility that had monopoly over wholesale electric power market violated § 2 by refusing to sell to competitors); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945) (A.P.'s bylaws restricting membership by competitors of existing members struck down as unreasonable restraint on competition); *Byars v. Bluff City News Co.*, 609 F.2d 843 (6th Cir.1979) (wholesale periodical distributor that refused to continue selling to a small jobber because it wished to take over the jobber's business violated § 2); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir.1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972) (defendants hindered plaintiff from extracting natural gas from a field by refusing access to transport facilities, pooling arrangements or a right-of-way); *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir.1966) (local radio station refused

to pay normal commission for material prepared by an advertising agency, effectively refusing to deal with it); *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir. 1958) (factual issue whether television station's refusal to accept a competitor's film programs was done in the exercise of business judgment or to eliminate competitor); *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.*, 194 F.2d 484 (lst Cir.), *cert. denied*, 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952) (defendants had to provide equal access to their commercially unique building; however, denial of access to competitor would be proper if done for valid business reason).

Recent developments in the telecommunications industry have further refined the essential facilities doctrine. In *MCI Communications Corp.*, the Seventh Circuit found that "it was technically and economically feasible for AT & T to have provided the requested interconnections, and that AT & T's refusal to do so constituted an act of monopolization," because AT & T controlled an "essential facility" for the establishment of long distance service—the local exchange service which brought the long distance signals to and from individual businesses and residences. 708 F.2d at 1133. The court stated:

> The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992–93 (D.C. Cir.1977), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978).

Id. at 1132–33 (additional citations omitted).

This test was applied by the Tenth Circuit in *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509,

1520–21 (10th Cir.1984), *aff'd*, 472 U.S. 585, 10 S.Ct. 2847, 86 L.Ed.2d 467 (1985). In *Aspen*, the operator of one of four skiing facilities in Aspen, Colorado brought an antitrust action against the owner of the other three facilities alleging that the latter's refusal to continue a joint marketing of an "all-Aspen ticket" violated § 2. The court found that the defendant controlled an essential facility (3 of the 4 mountains), that plaintiff could not easily duplicate the facility due to regulatory restrictions, delays and expenses, that defendant denied the use of the facility to plaintiff, and finally that it was feasible for defendant to provide access to the facility. The Supreme Court affirmed the Tenth Circuit but found it unnecessary to rely on the essential facilities doctrine. 472 U.S. 585, 600 (1985).

An application of the *MCI Communications Corp.* four-part test to the facts of this case yields a similar result. First, City Gas, a monopolist, controlled an essential facility—a pipeline that transported wholesale gas. Prior to 1984, when Consolidated received a FERC allocation, Consolidated could not have purchased wholesale gas from anyone except City Gas. After 1984, Consolidated could have purchased from City Gas or FGT, but would have encountered a prohibitive transportation problem if it had chosen the latter. A lateral pipeline connecting Consolidated's facilities to the FGT main would have cost $250,000, or approximately five cents per therm. There is grave doubt as to whether Consolidated could have effectively competed with City Gas based on these additional expenses, and there is also a serious question as to whether the FPSC would have approved such an increased cost based on an uneconomical duplication of City Gas' existing line.

This concern leads us to the second part of the *MCI Communications Corp.* test—whether Consolidated could practicably or reasonably duplicate the essential facility. In the AT & T line of cases, duplication of the local exchange

facilities would obviously be much more expensive than duplication of City Gas' lateral pipe. In *Otter Tail*, a case which is factually more similar to this case than are the AT & T cases, however, the Court did not even suggest that the municipalities should attempt to duplicate the electric transmission lines. Although the Court did not indicate the cost involved, we believe this to be highly supportive of a finding that such facilities cannot be reasonably duplicated. In *Aspen Skiing Co.*, the Tenth Circuit found that duplication was unreasonable "due to regulatory restrictions, and delays, and the expense and time required." 738 F.2d at 1521. The same is true here. Consolidated should not have had to wait two years to get FERC approval for a natural gas allocation. Additionally, it would have been unreasonable to require Consolidated to spend $250,000, which would potentially have made it uncompetitive with City Gas, to duplicate City Gas' lateral pipe. "To be 'essential' a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants." *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C.Cir.1977), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121(1978) (footnote omitted). We find that such duplication would have been impractical and unreasonable and would have severely, if not fatally, handicapped Consolidated's potential entry into the natural gas market. *See, e.g., Gamco, Inc.*, 194 F.2d at 487 (unique produce building would be unreasonable to duplicate even though space was available nearby).

The third part of the test requires that the monopolist deny the use of the facility to the competitor. It is undisputed that City Gas has refused to transport gas for Consolidated. [Tr. 3–15–16]. Additionally, City Gas agreed to sell gas only at 10 cents per therm over cost [Tr. 1–19–20; 3–13–14], which was eventually reduced to 7 cents per therm. [Tr. 3–16–17]. These unreasonable offers essentially amounted to a refusal to deal at all. City Gas justified the

latter price as reasonable because that is what it paid Peoples pursuant to an agreement between them whereby City Gas would serve a small area located within People's territory. We note, however, that pursuant to their territorial agreement, City and Peoples do not compete. Accordingly, this price cannot be viewed as an arm's length reasonable price. The evidence presented by Consolidated at trial suggested that a reasonable price was less than 1 cent per therm over cost. [Tr. 3–69]. Although we do not decide exactly what a reasonable price would have been, it is absolutely clear from the gross disparity between one cent and seven cents per therm, that City Gas' proposal amounted to a refusal to deal.

In *Aspen Skiing Co.*, the Tenth Circuit similarly dealt with an unreasonable offer that constituted a refusal to deal. There, defendant offered plaintiff a 12.5% share of joint revenues for the 1978–79 ski season. In the past plaintiff's share had never fallen below 13.2% based on surveys, and 15.8% based on actual usage. 472 U.S. at 590 & n. 8, 105 S.Ct. at 2851 & n. 8. Defendant admitted that it had refused to deal with plaintiff (738 F.2d at 1521), and that it had offered plaintiff a deal that plaintiff could not accept. 472 U.S. at 592, 105 S.Ct. at 2852. Although City Gas has not been quite so explicit, it is clear to us from the evidence in this case that City Gas' offer of seven cents per therm was one which was unreasonable and which it knew Consolidated could not accept. Indeed, City Gas' Vice President Ball indicated that he made no attempt to ascertain a reasonable price for direct gas sales to Consolidated, and that he came up with the cost-plus-ten-cents terms "out of the air." Consequently, we find that the third part of the *MCI Communications Corp.* test has been met.

Last, *MCI Communications Corp.* requires that it be feasible for the monopolist to provide its facility to plaintiff. In this case it is uncontradicted that it was technically feasible for City to provide Consolidated with an

interconnection and that the flow of gas via the interconnection could be easily monitored. Although City Gas has alleged that such an interconnection could deplete its potentially needed surplus supply of gas, City Gas' concerns are not supported by the record, and after 1984, when Consolidated received its own gas allocation, these concerns became moot. Accordingly, we find that all four parts of the *MCI Communications Corp.* test have been met, and thus, that Consolidated has established that this case involves an essential facility. Because City Gas has been unable to present us with any legitimate justification for its actions, we find that its refusal to deal constitutes an unlawful maintenance of monopoly power in flat violation of § 2 of the Sherman Act.

There are, however, defenses available to one who controls an essential facility and consciously refuses to make it available to others. "Absolute equality of access to essential facilities . . . is not mandated by the antitrust laws." *Southern Pacific Communications Co. v. American Telephone & Telegraph Co.*, 740 F.2d 980, 1009 (D.C.Cir.1984), *cert. denied*, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985). In *Terminal Railroad Association*, the Supreme Court made clear that access only need be afforded "upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the [monopolist]." 224 U.S. at 411, 32 S.Ct. at 516; *see Town of Massena v. Niagara Mohawk Power Corp.*, 1980–2 Trade Cas. (CCH) ¶ 63,526 (N.D.N.Y.1980) (monopolist need not provide preferential access to its facilities). In *Hecht*, the District of Colombia Circuit found that the essential facility must be made available on "fair terms," but that the "antitrust laws do not require than an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately." 570 F.2d at 992–93 (footnote

omitted); *see also United States v. American Telephone & Telegraph Co.*, 524 F.Supp. 1336, 1361 (D.C.Cir.1981) ("problems of feasibility and practicability may be taken into account by the Court in determining the sufficiency under the law of the access to essential facilities granted by defendants to non-Bell carriers"). Denials of access have also been justified based on a "regulatory defense." In several relevant cases against American Telephone & Telegraph, AT & T claimed that it refused to provide interconnections to other carriers because of its duty to comply with § 201(a) of the Communications Act (47 U.S.C. § 201(a) (1976)). Section 201(a) stated that when presented with an interconnection request, AT & T had to determine whether the interconnection would serve the public interest, before deciding whether to grant the request. *Southern Pacific Communications Co.*, 740 F.2d at 1009; *Mid-Texas Communications Systems v. American Telephone & Telegraph Co.*, 615 F.2d 1372, 1389 (5th Cir.), *cert. denied*, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980). In order to assert successfully this defense, it is required that the denial be reasonable and made in good faith on that basis, rather than solely on the basis of competitive considerations. *Southern Pacific Communications Co.*, 740 F.2d at 1009.

Notably, the justification of self-preservation has not been successfully asserted as a defense to denial of access to an essential facility. *Otter Tail Power Co.*, 410 U.S. at 380–82, 93 S.Ct. at 1031–32. In *Otter Tail*, the defendant unsuccessfully relied on this defense; the Supreme Court accepted the district court's conclusion that Otter Tail's fears were greatly exaggerated. *Id.* at 381, 93 S.Ct. at 1031.

A number of utility cases provide close factual comparisons to the case at bar. Of these cases, however, the facts of *Otter Tail* are most similar. In *Otter Tail*, a regulated electric utility refused to sell power wholesale or to transport power purchased from other sources (a procedure referred to as "wheeling") to municipalities which chose to

own their own retail distribution systems. Otter Tail's policy was to acquire existing municipal systems within its service area. Additionally, Otter Tail would attempt to prevent municipalities from replacing it when their franchises with Otter Tail expired. Between 1945 and 1970, twelve municipalities proposed to replace Otter Tail; only three were successful. Municipalities faced great obstacles in establishing their own systems. They had to purchase electricity at wholesale, and get that electricity transported to their customers. The only existing transmission lines in the area belonged to Otter Tail, and Otter Tail refused to sell or wheel power to them.

Furthermore, Otter Tail invoked restrictive contract clauses so that municipalities could not obtain power from other sources. Last, it engaged in a pattern of harassing litigation against any municipality which desired to set up its own system. Interestingly, Otter Tail did deal with municipalities which had always had their own power companies. Only when an Otter Tail customer attempted to establish its own power system would Otter Tail retaliate.

The district court found that Otter Tail used its monopoly power to foreclose competition or gain a competitive advantage, or to destroy a competitor. The court found further that there were no engineering factors that prevented Otter Tail from selling wholesale power and "that Otter Tail's refusal to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position." *Id.* at 378, 93 S.Ct. at 1030. Otter Tail's only defense was that "without the weapons which it used, more and more municipalities will turn to public power and Otter Tail will go downhill." *Id.* at 380, 93 S.Ct. at 1031. The district court rejected this argument as "not supported by the record." *Id.* at 381, 93 S.Ct. at 1031. The Supreme Court affirmed. *Id.* at 382, 93 S.Ct. at 1032. Although the district court relied on both the essential facilities doctrine and the intent test in finding Otter Tail's refusal to deal to

be illegal under § 2, the Supreme Court combined both theories in its analysis.

The facts presented in the instant case are remarkably similar to those in *Otter Tail.* City Gas initially refused to sell natural gas to Consolidated, and then, when Consolidated finally received its own natural gas allocation, City Gas refused to transport the gas. Similarly, the only pipeline available anywhere near the area Consolidated wished to serve was owned by City Gas. City Gas, like Otter Tail, had begun a practice of acquiring LP companies like Consolidated. Indeed, Consolidated thus far is the only Florida LP company to have attempted the conversion to natural gas. As in *Otter Tail,* the entry barriers Consolidated faced were great.

The justifications which City Gas has offered for its refusal to deal are as unpersuasive as those offered in *Otter Tail.* City Gas first claimed that if it sold gas to Consolidated, that it would deplete its own supply of gas, and then, if another natural gas shortage occurred it could not adequately serve its own customers. As noted in *Otter Tail,* if access will impair the utility's ability to render adequate service, interconnection will not be required. The evidence, however, does not support this conclusion. City Gas' current surplus gas allocation is so large, and Consolidated's needs so small that City Gas could serve all of Consolidated' needs by using only 1.8% of its *surplus* allocation. Additionally, now that Consolidated has received its own natural gas allocation, City Gas' reserve would be completely unaffected. Accordingly, we reject this defense.

City Gas also claimed that if Consolidated was allowed to sell natural gas then every LP dealer in the state might try to do so. [Tr. 3–161–3–162]. This statement seems to be alluding to the concern that Otter Tail raised—that new entrants would erode its market. Again, the evidence does not support such a finding in light of City Gas' overwhelming dominance in the area. Furthermore, and more important, as

noted in *Otter Tail*, "[t]he promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." *Id.* at 380, 93 S.Ct. at 1031 (quoting *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375, 87 S.Ct. 1856, 1863, 18 L.Ed.2d 1249 (1967)). Because we find that the requested interconnection would not impair City Gas' ability to render adequate service to its customers, we reject this defense.

Moreover, as in *Otter Tail*, there does not appear to be any technical reason why City Gas could not sell or transport gas to Consolidated. Indeed, as in *Otter Tail*, City Gas currently provides this service to at least one small gas company, Florida Gas. Additionally, neither Otter Tail nor City Gas offered any evidence to show why their behavior was in the public interest, thus we need not consider any regulatory defense. Accordingly, we find that based on the analysis offered in *Otter Tail*, City Gas' conduct constitutes an illegal refusal to deal in violation of § 2 of the Sherman Act.

Defendants cite *Florida Cities v. Florida Power & Light Co.*, 525 F.Supp. 1000 (S.D.Fla.1981), for the proposition that the essential facilities doctrine does not apply where access to defendant's facilities would simply be more economical to plaintiff than an alternative source. In that case, plaintiff, a power supplier wanted access to defendant's nuclear generated electricity because it was more cost-efficient than other methods of electricity generation. Plaintiff claimed that these facilities were essential and thus that defendant had an obligation to deal with it. In granting summary judgment for the defendant, the court found that defendant's facilities were "not bottleneck resources, and that plaintiff ha[d] not shown a firm interest in or need for access to defendant's facilities." *Id.* at 1005. Notably, however, defendant obtained only 29% of its electricity from nuclear power. Thus it is apparent that other forms of electricity provided the majority of even defendant's needs.

It is difficult to view nuclear power as an essential facility in light of this statistic. Second, the defendant did not even have enough nuclear power to serve all of its own customers, much less, all of plaintiff's customers. Thus, service to defendant's customers would have been impeded had defendant made its nuclear power available to plaintiff. And that is indeed a proper justification for a monopolist's refusal to deal.

The facts in this case are much different from those of *Florida Cities*. In the first place, City Gas uses natural gas to meet 100% of its needs. This provided a much stronger basis for inferring that natural gas, as opposed to any type of gas, is an essential facility. And second, City Gas has a large excess allocation of natural gas and we have found that City Gas' customers would not be hurt if it sold gas to Consolidated. Accordingly, we find *Florida Cities* inapposite.

City also claims that pursuant to Fla. Stat. § 366.03, it was never required to resell natural gas to Consolidated and hence could not have violated the antitrust laws in refusing to sell. Section 366.03 provides as follows:

> General duties of public utility.—Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the commission. *No public utility shall be required to furnish electricity or gas for resale except that a public utility may be required to furnish gas for containerized resale.* All rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it, and each rule and regulation of such public utility, shall be fair and reasonable. No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect.

(emphasis added). Although City Gas has not explained how this statute would insulate it from federal antitrust liability, apparently it is once again asserting state action immunity. Unlike the circumstances surrounding the territorial agreement, this statute affirmatively expresses a state policy. Two areas of concern, however, remain.

First, it is not at all apparent as required by *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42–44,105 S.Ct. 1713, 1718–19, 85 L.Ed.2d 24 (1985),[12] that the legislature clearly contemplated this type of anticompetitive effect. The statute appears to have been derived from *Florida Power & Light Co. v. State ex rel. Malcolm*, 107 Fla. 317, 144 So. 657 (1932). There, the Florida Supreme Court upheld a utility's refusal to provide gas to a landlord who proposed to buy it at wholesale, re-meter it, and resell it to his tenants at higher

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[12]In *Town of Hallie v. City of Eau Claire*, plaintiffs claimed that the city was trying to extend its existing sewage treatment monopoly to a monopoly on sewage transportation services. 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985). The city relied on a state statute which provided that a municipality may by ordinance fix the limits of its service to unincorporated areas, and shall have no obligation to serve beyond the area so delineated. The Seventh Circuit upheld the city's practices because they were effectuated pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, the first prong of the *Midcal Aluminum* test. 700 F.2d 376, 384–85 (7th Cir.1983). The Supreme Court affirmed, but noted that the activities were authorized, but not compelled, by the state, which did not actively supervise them. 471 U.S. at 45–47, 105 S.Ct. at 1719–21. The Court held that the first prong of *Midcal Aluminum* had been met because the statute showed that "the legislature contemplated the kind of action complained of." *Id.* at 44, 105 S.Ct. at 1719 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415, 98 S.Ct. 1123, 1138, 55 L.Ed.2d 364 (1978). The Court thus indicated that the test was one of forseeability by the legislature of the anticompetitive acts that would follow. *Id.* at 42–44, 105 S.Ct. at 1718–19. Additionally, for the first time the Court held that a municipality, unlike a private party, need not satisfy the second *Midcal Aluminum* prong, because absent a contrary showing, a municipality presumptively acts in the public interest. *Id.* at 46, 105 S.Ct. at 1720.

prices. Notably, the attorney general of the state appeared and argued in support of the utility. The attorney general's concern was that a decision in favor of the landlord might put the regulation of such services "beyond the control of the public authorities having jurisdiction over the subject-matter of reasonable rates to consumers of public utility services." *Id.* at 659. This concern plainly would not be applicable to sales by a utility to another gas company, which would have to submit to FPSC regulation before it could resell to the public.

Second, as explained in our discussion of the territorial agreement, we have found that the FPSC does not adequately supervise this type of anticompetitive conduct for purposes of the second prong of the *Midcal Aluminum* test. For example, based on the evidence presented, the FPSC has approved wholesale natural gas resale prices of both one cent over cost and seven cents over cost. No explanation has been offered for this disparity. Rather, the evidence here suggests that when an agreement between two gas utilities is presented to the FPSC, the FPSC normally approves it, assuming that the private parties have struck their best bargain. Again we find that City Gas' refusal to sell gas is not immune from the sweep of the Sherman Act. Moreover, and more important, by its own terms Fla.Stat. § 366.03 has no application at all to Defendant's refusal to *transport* gas. Thus City Gas' refusal to transport gas would be subject in any event to Sherman Act scrutiny.

We also note that the facts in this case are not like those presented in *MCI Communications Corp.* with respect to intercity interconnections. MCI alleged that Bell's intercity lines were essential facilities. In rejecting this argument, the court stated that the "evidence presented did not demonstrate either that the duplication of Bell's intercity lines was economically infeasible or that the denial of access inflicted a severe handicap on market entrants." 708 F.2d at 1148. We have specifically made findings to the contrary in

this case. Additionally, the *MCI Communications Corp.* court found that "MCI's primary business was to build precisely the type of facilities to which it sought access from the Bell System." *Id.* In the instant case Consolidated's primary business is to serve retail customers, and indeed, its retail pipes are already in place. Consolidated is not attempting to enter the wholesale gas business, and it is access to this type of pipe which it claims is essential. We agree.

2. *The Intent Test*

A second and independent basis for imposing § 2 antitrust liability upon City Gas for its refusal to deal would be a determination that Ciy Gas' actions constituted sufficient evidence of an intent to monopolize. "In addition to the cases finding liability for a refusal to deal when an essential service is involved, there are cases which find liability when a monopolist's refusal to deal with a competitor is shown to be evidence of an illegal intent to destroy competition. These cases focus on the intent and competitive effect of the refusal to deal; not on whether the facility itself is 'essential.' " *MCI Communications Corp.*, 708 F.2d at 1148 (citations omitted). In *Byars*, the theoretical distinction between the intent theory and the essential facilities doctrine was said to be that "the former focuses on the monopolist's state of mind while the latter examines the detrimental effect on competitors." 609 F.2d at 856. In practice, however, often there are many overlapping considerations.

The intent test originated with *United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), where the Court said that a business is free to deal with whomever it pleases so long as it has no "purpose to create or maintain a monopoly." *Id.* at 307, 39 S.Ct. at 468. This test was applied in *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927). There, Kodak had monopoly power over the national wholesale

market for certain photographic supplies. Kodak decided to vertically integrate and began buying out retail distributors. When one distributor refused to sell out, Kodak refused to sell it photographic supplies at wholesale prices. The jury found that Kodak had violated § 2. The Supreme Court affirmed despite the fact that the only evidence of monopolistic purpose was Kodak's desire to buy out retail distributors and its inability to provide a legitimate business reason for its actions.

In *Lorain Journal Co. v. United States*, a newspaper which was indispensable to local businesses refused to sell advertising space to customers who bought advertising on a local radio station. 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951). The Court found that this was designed to destroy the radio station, a competitor, and enjoined it as an illegal attempt to monopolize. The last well-known "intent" test case is *Otter Tail*, 410 U.S. 366, 93 S.Ct. 1022. As noted earlier, *Otter Tail* is also based on the essential facilities doctrine. Because Otter Tail's conduct was predatory and designed to destroy its competitor, however, the decision can be based also on the intent test. Finally, courts have also found a monopolist's refusal to deal to be unlawful where the monopolist has acted to preserve its monopoly. *See, e.g., Poster Exchange, Inc. v. National Screen Service Corp.*, 431 F.2d 334, 339 (5th Cir.1970), *cert. denied*, 401 U.S. 912, 91 S.Ct. 880, 27 L.Ed.2d 811 (1971) ("National Screen intentionally used the monopoly power it had at the manufacturing level to eliminate Poster as a competitor at the distributor-jobber level."); *United States v. Klearflax Linen Looms, Inc.*, 63 F.Supp. 32, 39 (D.Minn.1945) ("[monopolist] cannot refuse to sell if its design and purpose is to establish a wrongful monopoly.")

This does not end the analysis. As with the essential facilities doctrine, there are defenses available to a monopolist. Specifically, antitrust liability will not be imposed without first examining business reasons which

might justify a refusal to deal. *See Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 712 (7th Cir. 1977), *cert. denied*, 439 U.S. 822, 99 S.Ct. 87, 58 L.Ed.2d 113 (1979) (lawfulness of a monopolist's termination of a dealer depends upon the purpose for which it was done). "The rationale for this is that since we tolerate the existence of some monopolists, we must give them some leeway in making business decisions." *Byars*, 609 F.2d at 862 (citations omitted). *See, e.g., International Railways of Central America v. United Brands Co.*, 532 F.2d 231, 239–40 (2d Cir.), *cert. denied*, 429 U.S. 835, 97 S.Ct. 101, 50 L.Ed.2d 100 (1976) (defendant's refusal to deal lawful because it "had no reasonable business alternative but to abandon an unprofitable and uncomfortable operation."); *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.*, 194 F.2d 484, 487–88 & n. 3 (lst Cir.), *cert. denied*, 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952) (defendants may deny access to their building because of limited space or the applicant's financial unsoundness).

The instant case bears many similarities to the "intent" cases. First, City Gas' Chairman baldly admitted at trial that its actions toward Consolidated were intended to "protect its own domain." He posited that if Consolidated were to receive an allocation of natural gas to serve its customers that it "would give every other propane dealer a chance to request natural gas for their own development through the state . . . or the country." [Tr. 3–161–162]. Moreover, City Gas' Vice-President, Ivan Ball, said basically the same thing. These statements strongly suggest that City Gas' intent simply was to destroy competition. Second, similar to *Kodak*, City Gas' refusal to sell gas to Consolidated took place after City Gas had determined that it wished to buy out Consolidated. We have found that City Gas' defenses for this action do not justify its behavior. Furthermore, we note again the similarity this case bears to *Otter Tail*. Otter Tail's unjustified refusal to sell or wheel electricity was found to show an intent to drive out competition. We find similarly

that City Gas' behavior was designed to foreclose competition. Finally, City Gas has offered us no business justification for its refusal to sell or transport gas to Consolidated. Indeed, the evidence suggests that since City Gas' charge to Consolidated would be based on a cost-plus basis, that even a one-cent-per-therm rate would provide City Gas with a substantial profit and minimal additional related expenses. Accordingly, although City Gas generally may be free to deal with whomever it pleases, we find based on a review of the record evidence, that its real purpose here was to maintain its monopoly unlawfully, and conclude that its behavior constitutes an illegal refusal to deal under § 2 of the Sherman Act.

3. *Other Predatory Acts*

Consolidated offered proof at trial of a number of other acts by City Gas which it claimed were also exclusionary and anticompetitive. Consolidated need not prove every single act; rather, it must establish that City Gas has engaged in an overall pattern of anticompetitive behavior. In *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985), the defendant argued that each of the "six things" on which plaintiff relied to demonstrate deliberate exclusion from the Aspen ski market must be supported by sufficient evidence for a § 2 verdict. The court rejected that argument and held:

> We cannot agree that each one of the "six things" which plaintiff argued demonstrated abuse of monopoly power, taken alone, must be supported by sufficient evidence to find a § 2 violation. . . .
>
> [D]efendant's argument would require that we view each of the "six things" in isolation. To do this, however would be contrary to the Supreme Court's admonition that an antitrust plaintiff "should be given the full benefit of [its] proof without tightly compartmentalizing

> the various factual components and wiping the slate clean after scrutiny of each." Plaintiff's evidence should be viewed as a whole. Each of the "six things" viewed in isolation need not be supported by sufficient evidence to amount to a § 2 violation.

Id. at 1522 n. 18 (citations omitted).

The record has shown additional evidence of Defendant's anticompetitive behavior. And although we do not hold that any of the following acts standing alone—unlike the territorial agreement not to compete or the refusal to deal—would necessarily violate the Sherman Act, when viewed in concert with the anticompetitive behavior already discussed, they further demonstrate City Gas' abuse of monopoly power and support a finding that City Gas has violated § 2.

In this context, we believe that City Gas' acts of acquiring Nationwide and Miramar are evidence of its intent to eliminate any potential competitors. City Gas' efforts to acquire Consolidated further support this finding. While we make no specific findings here as to whether City Gas also violated § 7 of the Clayton Act, a number of the factors associated with violations of this provision are present here. One such factor is an industry trend toward concentration—certainly a characteristic of the natural gas industry in this region and, indeed nationwide. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 343–46, 82 S.Ct. 1502, 1533–35, 8 L.Ed.2d 510 (1962); *United States v. Kimberly-Clark Corp.*, 264 F.Supp. 439, 462–65 (N.D. Cal.1967); *United States v. Kennecott Copper Corp.*, 231 F.Supp. 95, 102–05 (S.D. N.Y.1964), *aff'd per curiam*, 381 U.S. 414, 85 S.Ct. 1575, 14 L.Ed.2d 692 (1965). Another factor which has often figured prominently in the application of § 7 is the high market share of the acquiring firm. *See, e.g., United States v. Phillipsburg National Bank & Trust Co.*, 399 U.S. 350, 90 S.Ct. 2035, 26 L.Ed.2d 658 (1970); *United States v. Continental Can Co.*, 378 U.S. 441, 84 S.Ct. 1738, 12 L.Ed.2d

953 (1964). In this regard, City Gas clearly dominates the relevant market for natural gas. Yet a further factor deemed relevant to horizontal acquisitions such as City Gas has carried out with respect to Nationwide and Miramar is the inelastic nature of supply and demand in the market. 4 Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 19.02[11] (1968). Because natural gas in these circumstances is being used as a home fuel product such as for cooking and heating, the demand for it remains relatively constant except for seasonal variations. This inelasticity is also present in the supply of natural gas, as to which there is expected to be a large surplus for the foreseeable future.

Without delving further into an inquiry as to City Gas' possible violation of this Clayton Act provision, we note that City Gas' acquisition of Miramar and Nationwide, as well as its putative acquisition of Consolidated Gas, provide additional evidence of the corporation's intent to monopolize the relevant market and eliminate competition.

Consolidated also claims that City Gas violated § 2 by intervening in Consolidated's FERC proceeding to oppose Consolidated's application for a natural gas allocation. City Gas argues that the *Noerr-Pennington* Doctrine immunizes its opposition before the FERC even though such actions delayed Consolidated's efforts to obtain natural gas. Two Supreme Court decisions—*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965)—established the general rule that "lobbying and other similar concentrated efforts by businessmen to obtain legislative or executive action do not violate the antitrust laws, even though intended to eliminate competition or otherwise restrain trade." 6 Von Kalinowski, Antitrust Laws and Trade Regulation § 46A.01 (1986) (footnote omitted). The rationale behind the doctrine is the belief that "public participation in the legislative process, no

matter how selfish the participant's motivation, must be encouraged even at the expense of possible injury to competition. . . ." *Id.*

Whether the *Noerr-Pennington* defense is applicable or not, two facts are clear: first, Consolidated was severely damaged by the delay which occurred as a direct result of City Gas' intervention; and, second, City Gas' reason for opposing Consolidated's application was to protect its own domain. [Tr. 3–161–162, 174]. Thus, although we do not hold that City Gas' intervention in the FERC proceeding violated § 2, we believe evidence of City Gas' motives are derived from its officers' statements regarding Consolidated's application.

Finally, Consolidated has alleged that City Gas engaged in price discrimination to take away Consolidated's existing and prospective customers. Courts have long recognized that "'predatory pricing' may be a means of obtaining or maintaining a monopoly position in violation of Section 2 of the Sherman Act. . . ." *Janich Bros. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir.1977), *cert. denied*, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978) (citing *United States v. American Tobacco Co.*, 221 U.S. 106, 160, 182, 31 S.Ct. 632, 640, 649, 55 L.Ed. 663 (1911), and *Standard Oil Co. v. United States*, 221 U.S. 1, 43, 31 S.Ct. 502, 509, 55 L.Ed. 619 (1911)). The essence of the violation is whether there has been "discrimination" in the prices charged by a seller to different purchasers.

In the instant case, City Gas' Chairman testified that his orders were to charge every customer contributions in aid of construction when the cost of extending natural gas service to any customer exceeded the "feasibility rule." [Tr. 5–192–193]. City Gas' Vice-President testified that the Chairman's orders were followed. [Tr. 8–87]. There is no conflict in the evidence that City Gas generally charged "contributions in aid of construction" to commercial customers when appropriate [Tr. 9–47] and that none of

Consolidated's commercial customers were required to contribute to City Gas' installations of the pipes to serve them. [Tr. 3–241–243]. City Gas' counsel stipulated at the trial that some $19,000 in contributions were required under the feasibility rule and had been waived by City Gas in extending service. Expert testimony was adduced that the FPSC procedures require use of prior gas bills to calculate whether contributions in aid of construction are required and that, because they were not used, City Gas' estimations of residential revenues were overstated by some 71%, to make it appear that contributions were not required. [Tr. 5–116–120]. The only feasibility study produced by City Gas as to these customers had been prepared four months after this suit was filed and almost one year after the service had been extended. [Tr. 8–4].

Again, we do not hold that City Gas' failure to charge contributions in aid of construction establishes a predatory pricing scheme necessarily sufficient to state an independent cause of action under § 2 of the Sherman Act, but we do find that this conduct, when viewed with other behavior of City Gas, is still further evidence of City Gas' intent to eliminate Consolidated.

G. *Damages*

The Supreme Court has acknowledged the uncertainty necessarily involved in proving damages in antitrust cases: "The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566, 101 S.Ct. 1923, 1929, 68 L.Ed.2d 442 (1981). An antitrust wrongdoer cannot defeat recovery by insisting on rigorous proof of damages. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576–77, 23 L.Ed.2d 129 (1969). The amount of damages can be determined by the trier of fact based on "a just and reasonable estimate . . . based on relevant data." *Bigelow v.*

RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S.Ct. 574, 580, 90 L.Ed. 652 (1946). Such an estimate may include both "'probable and inferential, as well as direct and positive proof.' " *Id.* (citations omitted). An antitrust plaintiff has a lesser burden of proof as to damages than do plaintiffs in other types of civil actions. *See Zenith Radio Corp.*, 395 U.S. at 123, 89 S.Ct. at 1576–77; *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 864 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981).

Our former Fifth Circuit in *Malcolm*, recognizing the "relaxed standard" in calculating damages in antitrust cases, stated:

> This relaxed standard is based on a recognition of the difficulty in reconstructing events that might have happened but for the defendant's unlawful conduct. It is appropriate that if there is uncertainty, the defendant should bear the burden of that uncertainty because his unlawful actions created it.

642 F.2d at 864. The Eleventh Circuit has adopted the rule set forth in the *Malcolm* case. *See Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560, 1578–79, 1580 n. 38 (11th Cir.1983).

We find that the evidence presented by Plaintiff's expert, Mr. Ben Ball, whose testimony we have credited, meets this standard. Mr. Ball presented this Court with a detailed analytical formula which supported his determination of the diminution in Consolidated's going concern value. Ball began by determining the net present value of the cash flow stream generated by each of Consolidated's customers during the relevant time period, subtracted costs which Consolidated would have incurred, and added the present value of customers which Consolidated probably would have obtained in the absence of City Gas' actions. Each of these calculations was based on detailed estimates of costs and revenues which were broken

down for each item Ball considered. The six percent annual growth rate, which Ball used to determine what Consolidated's growth would have been, was also supported by the testimony of another expert, Mr. Starke. Finally, Ball's determinations of both Consolidated's actual value and its lost profits were based on the precise amount offered for the company by City Gas and the actual gross revenues collected by City Gas less costs. In sum, we conclude that Ball's testimony amply meets the definiteness standard set forth in this Circuit for proof of antitrust damages.

Consolidated seeks to recover both its lost profits during the period of City Gas' antitrust misconduct and the resulting diminution in the value of the business as a going concern. We find that Consolidated is entitled to recover both of these types of damages. *See Eiberger v. Sony Corp. of America*, 622 F.2d 1068, 1081 (2d Cir.1980); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 51 (6th Cir.1976), *overruled on other grounds, Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir.1983); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 958–59 (10th Cir.1959), *cert. denied*, 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed.2d 1727 (1960). Additionally, Consolidated is entitled to three times the amount of damages proved. 15 U.S.C. § 15.

Loss of going concern value involves primarily an evaluation of the plaintiff business' loss of good will as a result of the defendant's conduct. The Eleventh Circuit in *Graphic Products Distributors, Inc. v. Itek Corp.*, succinctly stated the manner in which diminution in going concern value is calculated and the method by which it is proved:

> Proof of the diminution in the going concern value of a business is ascertainable by comparing the fair market value of the business before and after the antitrust violation. *See Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1245 (5th Cir.1974), *cert. denied*, 420 U.S. 992, 95 S.Ct. 1427, 43 L.Ed.2d 673 (1975). Testimony of business appraisal experts as to what a

> hypothetical willing buyer would pay a hypothetical willing seller on the open market would be one method of establishing loss in going concern value.

717 F.2d 1560, 1580, n. 37 (11th Cir.1983). Moreover, in determining what the value of a business would have been in the absence of an antitrust violation, the "market share" theory may be used. This theory involves an estimation of the market share the plaintiff would have had but for the defendant's unlawful conduct. Based on the market size and an estimate of plaintiffs likely profit margin, the total profits the plaintiff would have earned if the estimated market share had been achieved are determined. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 116, 89 S.Ct. 1562, 1572–73, 23 L.Ed.2d 129 (1969). This theory, which takes into account the projected expansion of the plaintiff's business in a market unaffected by the wrongful conduct, serves to compensate the plaintiff not only for the actual customers or business lost to the monopolist but also for the *additional business* plaintiff would have had but for the defendant's unlawful conduct.

Furthermore, Consolidated may recover both lost past profits for City Gas' unlawful conduct and damages for the resulting diminution in its going concern value. This was made clear by the Tenth Circuit in *Atlas Building Products Co. v. Diamond Block & Gravel Co.*:

> The statute speaks of injury to "business or property." And see Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C.A. § 15. And, those words in their ordinary sense have been construed in terms of (1) the difference, if any, between the amounts actually realized by the injured party and what it would have reasonably expected to realize from sales but for the unlawful acts complained of; and (2) the extent to which the value of the petitioner's property had been diminished as a result of such acts. *We think both loss of profits in business and diminishment of the assets were proper*

elements of damage, and the trial court did not err in so submitting the case to the jury.

269 F.2d 950, 958–59 (10th Cir.1959), *cert. denied*, 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed.2d 1727 (1960) (emphasis added) (citations and footnote omitted); *accord, Eiberger v. Sony Corp. of America*, 622 F.2d 1068, 1081–82 (2d Cir.1980); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 51 (5th Cir.1976), *overruled on other grounds, Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir.1983).

Consolidated is entitled to recover damages from February 20, 1982, as that is the date when the Board of Directors of City Gas focused the economic power of City Gas on Consolidate in a resolution authorizing Sid Langer to attempt to acquire Consolidated—prior to any discussions with Consolidated. Much planning and activity must have occurred prior to this date (the minutes reflect Mr. Langer's report that he was already attempting to acquire Consolidated), but the date of the meeting presents a reasonable starting point, based on solid evidence, for calculating the damages herein. *Cf. Hobart Bros. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 903 (5th Cir.), *cert. denied*, 412 U.S. 923, 93 S.Ct. 2736, 37 L.Ed.2d 150 (1973); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971).

Consequently, we find that, when applying these theories, City Gas' anticompetitive actions were the proximate cause of antitrust damages to Consolidated in the following amounts: (1) $1,503,975—the difference between (a) Consolidated's market value as a natural gas company selling gas at the same rates charged by City Gas with the growth Consolidated could reasonably have been expected to enjoy and (b) the present market value of Consolidated as a result of the injuries caused by City Gas' actions; plus (2) $83,090.15—lost profits that Consolidated would have earned from the customers taken by City Gas, calculated at the rates that City Gas charged such customers for natural

gas less the costs of the natural gas sold to them. Consolidated is therefore entitled to recover from City Gas the amount of $1,587,065.15 trebled, or the total sum of $4,761,195.45 in antitrust damages.

We also find that Consolidated is entitled to injunctive relief. Injunctive relief under § 16 of the Clayton Act (15 U.S.C. § 26) is granted for the purpose of preventing threatened loss or damage by reason of a violation of the federal antitrust laws. *Helfenbein v. International Industries, Inc.*, 438 F.2d 1068, 1071 (8th Cir.), *cert. denied*, 404 U.S. 872, 92 S.Ct. 63, 30 L.Ed.2d 115 (1971). In the framing of equitable decrees, the district courts are clothed with broad discretion to model their judgments to fit the exigencies of the particular case. *See Allis-Chalmers Manufacturing Co. v. White Consolidated Industries, Inc.*, 414 F.2d 506, 525 n. 32 (3d Cir.1969), *cert. denied*, 396 U.S. 1009, 90 S.Ct. 567, 24 L.Ed.2d 501 (1970). As the court in *Bergjans Farm Dairy Co. v. Sanitary Milk Producers* stated:

> An injunction in a suit by a private individual cannot correct completely a monopolistic situation caused by the unlawful action of defendants, but should open the market to competition in every way that is appropriate, because it is the purpose of the antitrust laws to prevent the accomplishment of an unlawful result by every means, and not by just the means found unlawful in that particular case.

241 F.Supp. 476, 488 (E.D.Mo.1965), *affd*, 368 F.2d 679 (8th Cir.1966).

In the instant case, Consolidated has asked this Court to require City Gas to sell or transport natural gas to Consolidated at a reasonable price. Because we have found, among other things, that City Gas controls an essential facility, we are compelled to grant this request. There is no adequate remedy at law which would make Consolidated

whole. We are not, however, prepared to determine exactly what a reasonable price would be. *See, e.g., Byars*, 609 F.2d at 863–64. Florida has a regulatory agency to whom we can turn to obviate the problem of judicial price-setting in this regulated industry. Thus, we shall defer to a decision of the FPSC in making this finding. Accordingly, if Consolidated wishes to sell natural gas, which it may purchase from City Gas, the Defendant shall sell or transport natural gas to Consolidated at a reasonable price to be determined by the FPSC.

IV. CITY GAS' COUNTERCLAIM: THE ILLEGAL TYING CLAIM

Defendant/Counterplaintiff City Gas has filed an Amended Counterclaim alleging in three counts that Consolidated violated §§ 1 and 2 of the Sherman Act, and § 3 of the Clayton Act, by tying the sale of homes in the Bel Air/Point Royale Subdivision to the purchase of LP gas from Consolidated. We find that City Gas has failed to sustain its burden as to each of these contentions.

Section 3 of the Clayton Act provides:

> Sale, etc., on agreement not to use goods of competitor.
>
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to

substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14.

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5–6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958) (footnote omitted). Tying arrangements have been challenged successfully under § 1 of the Sherman Act, § 3 of the Clayton Act, and as conduct supporting a finding that § 2 of the Sherman Act has been violated. Section 3 of the Clayton Act, however, applies only to those arrangements in which both the tying and tied products are *"goods, wares, merchandise, machinery, supplies or other commodities"* 15 U.S.C. § 14 (emphasis added). Section 3 is by its literal terms limited to a sale, lease or contract of these enumerated items, and articles of the same class and character. A "commodity" is thought generally to be tangible personal property, and therefore tying arrangements involving such intangibles as credit, services and trademarks do not fall within the ambit of § 3.

It is equally clear that land is not a "commodity" under the Clayton Act. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 521, 89 S.Ct. 1252, 1267–68, 22 L.Ed.2d 495 (1969) (Fortas, J., dissenting) ("Clayton Act provision applies only to 'goods, wares, merchandise, machinery, supplies, or other commodities,' and not to land."); *Blackwell v. Power Test Corp.*, 540 F.Supp 802, 812 (D.N.J.1981), *affd*, 688 F.2d 818 (3d Cir.1982); *see Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center, Inc.*, 219 F.Supp. 400, 403 (W.D.Pa.1963). Thus, if the tying arrangement does not involve a commodity, but rather land, services or credit, it is not governed by the Clayton Act at all. It would, however, fall

within the scope of the Sherman Act, and the plaintiff would be required "to bear the additional burden of proving that the defendant's economic power with respect to the tying product is sufficient to produce an appreciable restraint." *N.W. Controls, Inc. v. Outboard Marine Corp.*, 333 F.Supp. 493, 500 (D.Del.1971). Thus, City Gas cannot claim that this tying arrangement violates § 3 of the Clayton Act.

City Gas has also claimed that §§ 1 and 2 of the Sherman Act were violated by Consolidated's tying arrangement. Section 1 of the Sherman Act provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1. Of course, not every agreement violates § 1, but rather only those that unreasonably restrict competition. Regardless of the character of the contract, combination, or conspiracy, every § 1 violation requires proof: (1) that a contract, combination or conspiracy between two or more entities was present; (2) that a contract unreasonably restrains trade; and (3) that it affects interstate or foreign commerce. A tying arrangement will violate § 1 if the plaintiff can establish that two separate products are involved; that there is indeed a sale or agreement which has conditioned the sale of one product (the tying product) upon the purchase of another (the tied product); that the seller has engaged in some modicum of coercive conduct toward the buyer; that the seller has sufficient economic power in the market for the tying product to enable it to restrain trade in the tied product market; and, finally, that a not insubstantial amount of commerce in the tied product is affected. *Hirsh v. Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1346–47 (9th Cir.), *cert. denied*, 459 U.S. 973, 103 S.Ct. 305, 74 L.Ed.2d 285 (1982).

City Gas' Sherman Act tying claim must fail first because it has not established that the seller (Consolidated Gas) had sufficient economic power as to the tying product (real estate) to restrain trade appreciably in the market for the tied product. *See Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 375 (5th Cir.1977). An analysis of market power as to the tying product and the effect of the wrongful activity must be made in the context of a relevant economic market.

The Defendant has failed to present sufficient evidence, including economic testimony, to define the relevant product or geographic market for these products. That failure, we think, is fatal as to the tying claim. "An antitrust plaintiff . . . makes out a prima facie case under the rule of reason only upon 'proof of a well-defined relevant market upon which the challenged anticompetitive actions would have had a substantial impact.' " *Dougherty v. Continental Oil Co.*, 579 F.2d 954, 962 (5th Cir.1978), *vacated by stipulation of the parties*, 591 F.2d 1206 (5th Cir.1979) (quoting *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825 (9th Cir.1971), *cert denied*, 404 U.S. 1049, 92 S.Ct. 715 & 716, 30 L.Ed.2d 740 (1972)) (additional citations omitted); *see also L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 422 (11th Cir.1984).

A fair review of the facts presented has not established Consolidated's market power as to the tying product—real estate. *United States v. Loew's, Inc.*, 371 U.S. 38, 45, 83 S.Ct. 97, 102, 9 L.Ed.2d 11 (1962). Nor has City Gas fully satisfied its burden—even assuming it had sufficient market power within a discernible market—that customers were coerced into buying the tied product. Moreover, a claim of monopolization or attempted monopolization also requires proof that a defendant either possesses or is perilously close to possessing monopoly power within those markets. City Gas has not established either the relevant markets or appreciable or monopoly power within those markets.

Without sufficient proof that Consolidated has, within the relevant markets, *monopoly power* as to its § 2 Sherman Act claim, or *appreciable market power* as to its § 1 Sherman Act claim, we cannot find any violation of the antitrust laws.

Beyond failing to establish that Consolidated possessed monopoly power or even appreciable market power within definable markets, City Gas has also failed to establish that Consolidated's conduct actually foreclosed City Gas from competing. City Gas claims that "[a]s a direct and proximate result of the inhibiting, threatening and coercive effect of the exclusivity provisions and restrictive convenants . . . CITY GAS has been precluded by CONSOLIDATED from effectively providing its natural gas product to the subdivision." [Amended Counterclaim, ¶ 10].

Damages may be obtained under § 4 of the Clayton Act by "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. And "[i]t is enough that the illegality is shown to be a material cause of the injury. . . ." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571 n. 9, 23 L.Ed.2d 129 (1969). Nevertheless, City Gas must show some direct causal relationship between the purported violation of the antitrust laws and the injury sustained. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). And if the wrongful conduct was not the cause of any palpable injury, then no actionable violation of the antitrust law has occurred. Sometimes the issue is framed as one of standing. In this Circuit, the test applied in order to determine standing to sue in an antitrust case has been explained in *Amey, Inc. v. Gulf Abstract & Title, Inc.*:

> The Eleventh Circuit has adopted the "target area" test used by the Fifth Circuit. *See Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752, 762 (11th Cir. 1983). The rule of antitrust standing in this circuit, the target area test,

does not produce results materially different from the results obtained in *Blue Shield* [*of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982)] and *Associated General* [*Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983)]. *See Construction Aggregate Transport*, 710 F.2d at 762, 765, n. 28. First, as in *Blue Shield*, we recognize that a "target" does not have to be in the same area of the market as the antitrust act; a victim is a target when located in the same area of the market affected by the antitrust act or in another area of the market "so closely related" that both may be considered targets of the same anti-competitive act. *Construction Aggregate Transport*, 710 F.2d at 764; *Blue Shield*, 457 U.S. at 479–81, 102 S.Ct. at 2548–49. Second, our test is highly responsive to the Supreme Court's policies of denying standing to plaintiffs with injuries that are too remote and whose injuries are not "the type of loss which a violation of antitrust law would be likely to cause." *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 710 (11th Cir. 1984); *Construction Aggregate Transport*, 710 F.2d at 764, 765. *See Associated General*, 459 U.S. at 540, 103 S.Ct. at 910; *Blue Shield*, 457 U.S. at 479, 102 S.Ct. at 2548. *See also Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir.1975). Third, the Supreme Court's policy against granting standing where the possibility exists of duplicative recovery by the indirectly injured plaintiff and the more directly injured person who has yet to sue, *see Associated General*, 459 U.S. at 545, 103 S.Ct. at 912, *Blue Shield*, 457 U.S. at 475, 102 S.Ct. at 2646, has long been part of this circuit's and the former Fifth Circuit's target area test. *Construction Aggregate Transport*, 710 F.2d at 764; *Jeffrey v. Southwestern Bell*, 518 F.2d at 1131. The Supreme Court cases, therefore, provide policy guidance consistent with that

> which is the foundation of this circuit's target area test. *See Midwestern Waffles, Inc.*, 734 F.2d at 710. *See also Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corp.*, 711 F.2d 989, 999 (11th Cir. 1983).

758 F.2d 1486, 1496–97 (11th Cir.1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1513, 89 L.Ed.2d 912 (1986) (footnote omitted).

Part of the Counterclaim alleges damages for the period of time preceding Consolidated's commencement of the state court action on June 1, 1982; another part relates to the period in which City Gas was preliminarily enjoined from providing natural gas service to customers within the subdivision, that is, from June 16, 1982, through November 30, 1982, when the injunction was dissolved by the state court; and the last part relates to the period after November 30, 1982. During no portion of time can City Gas claim that it sustained injuries as a result of Consolidated's conduct.

In the first place, the record evidence established that City Gas was not actually precluded from selling or offering to sell gas prior to the date Consolidated filed the state court complaint. City has admitted that it was wholly unaware of the existence of the "Easement Agreement" prior to June 1, 1982. Jack Langer of City Gas indicated that no one told him about Consolidated's claim to have any exclusive rights until filing the lawsuit in state court. Nor is there any record evidence suggesting that City Gas made an effort to sell natural gas or to solicit customers prior to approximately February 1982. Indeed, City Gas has stipulated as fact that it did not consider selling natural gas to customers in the territory served by Consolidated until 1982, and that once it decided to do so, it acted immediately to solicit Consolidated's customers and began extending its pipelines accordingly. The evidence also leads us to conclude that City Gas did not consider it economically feasible to extend its pipelines into Consolidated's area until 1982, when it did so.

We do not think City Gas can establish on this record that it sustained antitrust injury as a result of conduct about which it knew nothing. In short, City Gas was neither restrained nor deterred in any way by Consolidated's conduct prior to June 1982.

Nor, finally, does the record evidence establish that subdivision customers—and indeed only a small handful of them were called to testify at trial by City Gas—refrained from turning to City Gas as an alternative source of energy because of the "Easement Agreement." Those customers who did testify indicated that when they changed suppliers they were driven to do so by considerations of price. City Gas has, therefore, presented no evidence that it suffered damages resulting from the "Easement Agreement" prior to June 1, 1982.

Moreover, for the period subsequent to November 30, 1982, when the state court preliminary injunction was dissolved, City Gas was in no way foreclosed or excluded from providing natural gas service to homes and businesses within the subdivision. The state court held that City Gas was free to provide natural gas service across Consolidated's easements. And indeed following the dissolution of the injunction, City Gas resumed extending its lines to take customers from Consolidated and continued supplying the ones it had signed up earlier. Thus, City Gas also has failed to show that it suffered any damages subsequent to November 30, 1982.

Finally, as to the period when the injunction was in effect, from June 16, 1982 to November 30, 1982, a clear and unambiguous release was executed by the parties as to any damages which might arguably be attributed to the state suit or the preliminary injunction, thereby releasing Consolidated from any potential liability. The release settled the record as to any "damages and costs incurred by [City Gas] as a result of the fact the [Consolidated] obtained the issuance of an injunction," and the release constituted a

"full settlement and payment for costs and damages incurred by the defendant as a result of this lawsuit." City Gas has not argued that the release was invalid for any reason, or that it does not operate to bar any claims for damages in this action for the time period between June 1, 1982 and November 30, 1982. In short, we can find no viable theory upon which City Gas can sustain its burden as to injury and damages during this time frame.

Since we have concluded that City Gas has not established a number of critical elements necessary to sustain any claim under the Sherman Act, this Court need not address Consolidated's contention that the Counterclaims are barred also by the doctrines of res judicata and collateral estoppel.

Appendix E

APPENDIX E

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.)

Appendix F

APPENDIX F

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expenditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct

primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumental titles of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a) (2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

(As amended Sept. 12, 1980, Pub.L. 96-349, § 4(a) (1), 94 Stat. 1156; Dec. 29, 1982, Pub.L. 97-393, 96 Stat. 1964).

Appendix G

APPENDIX G

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

(As amended Sept. 30, 1976, Pub.L. 94–435, Title III, § 302(3), 90 Stat. 1396; Oct. 17, 1978, Pub.L. 95–473, § 3(b), 92 Stat. 1466.)

Appendix H

APPENDIX H

CHAPTER 366

PUBLIC UTILITIES

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[1]**366.01 Legislative declaration.**—The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose.

History.—s. 1, ch. 26545, 1951; s. 3, ch. 76-168; s. 1, ch. 77-457; s. 16, ch. 80-35; s. 2, ch. 81-318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81-318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]**366.015 Interagency liaison.**—The commission is directed to provide for, and assume primary responsibility for, establishing and maintaining continuous liaison with all other appropriate state and federal agencies whose policy decisions and rulemaking authority affect those utilities over which the commission has primary regulatory jurisdiction. This liaison shall be conducted at the policymaking levels as well as the department, division, or bureau levels. Active participation in other agencies' public hearings is encouraged to transmit the commission's policy positions and information requirements, in order to provide for more efficient regulation.

History.—s. 6, ch. 74–196; s. 3, ch. 76–168; s. 1, ch. 77–457; ss. 1, 16, ch. 80–35; s. 2, ch. 81–318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]**366.02 Definitions.**—As used in this chapter:

(1) "Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state; but the term "public utility" as used herein does not include either a cooperative now or hereafter organized and existing under the Rural Electrification Cooperative Law of the state; a municipality or any agency thereof; any natural gas pipeline transmission company making only sales of natural gas at wholesale and to direct industrial consumers; or a person supplying liquefied petroleum gas, in either liquid or gaseous form, irrespective of the method of distribution or delivery, unless such person also supplies electricity or manufactured or natural gas.

(2) "Commission" means the Public Service Commission.

History.—s. 2, ch. 26545, 1951; s. 3, ch. 76–168; s. 1, ch. 77–457; ss. 2, 16, ch. 80–35; s. 2, ch. 81–318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]**366.03 General duties of public utility.**—Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the commission. No public utility shall be required to furnish electricity or gas for resale except that a public utility may be required to furnish gas for containerized resale. All rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it, and each rule and regulation of such

public utility, shall be fair and reasonable. No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect.

History.—s. 3, ch. 26545, 1951; s. 3, ch. 76–168; s. 1, ch. 77–457; s. 16, ch. 80–35; s. 2, ch. 81–318; ss. 1, 15, ch. 82–25.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of that date. Expires October 1, 1989, pursuant to s. 15, ch. 82–25; and is scheduled for the review pursuant to s. 11.61 in advance of that date.

366.031 Definitions; preference relating to cable television prohibited; penalties.—

(1) As used in this section, the term:

(a) "Affiliate," when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.

(b) "Cable service" means:

1. The one-way transmission to subscribers of video programming or any other programming service; and

2. Subscriber interaction, if any, which is required for the selection of such video programming or other programming service.

(c) "Cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include:

1. A facility that serves only to retransmit the television signals of one or more television broadcast stations;

2. A facility that serves only subscribers in one or more multiple-unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way;

3. A facility of a common carrier, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers; or

4. Any facilities of any electric utility used solely for operating its electric utility systems.

(d) "Video programming" means programming provided by or generally considered comparable to programming provided by a television broadcast station or cable system.

(2) No electric utility shall make or give any preference or advantage to any person as an accommodation or inducement to that person to contract with or take the services of any entity which is an affiliate of such electric utility and which entity provides video programming to persons within all or any part of the service area of such electric utility.

(3) No electric utility shall make or give any preference or advantage over any entity which is not an affiliate of such electric utility, and which entity provides video programming to persons within all or any part of the service area of such electric utility, to any entity which is an affiliate of such electric utility and which entity provides video programming to persons within all or any part of the service area of such electric utility.

(4) Upon a finding by a court of competent jurisdiction that either any electric utility or its affiliate providing video programming services within all or any part of the service area of the electric utility has violated the provisions of this section, the court:

(a) May award actual damages to any other entity not an affiliate of the electric utility providing video programming services to persons within all or any part of the service area of the electric utility, and may grant injunctive relief.

(b) Shall award costs of any action, together with reasonable attorney's fees, to the prevailing party.

History.—s. 4, ch. 87-266.

[1]366.04 Jurisdiction of commission.—

(1) In addition to its existing functions, the commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service and the issuance and sale of its securities, except a security which is a note or draft maturing not more than 1 year after the date of such issuance and sale and aggregating (together with all other then-outstanding notes and drafts of a maturity of 1 year or less on which such public utility is liable) not more than 5 percent of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this section shall be the fair market value as of the date of issue. The commission, upon application by a public utility, may authorize the utility to issue and sell securities of one or more offerings, or of one or more types, over a period of up to 12 months. The commission may take final action to grant an application by a public utility to issue and sell securities after having given notice in the Florida Administrative Weekly published at least 7 days in advance of final agency action. Securities issued by a public utility pursuant to an order of the Commission, which order is certified by the clerk of the commission and which order approves or authorizes the issuance and sale of such securities, shall not be invalidated by a modification, repeal, or amendment to that order or by a supplemental order; however, the commission's approval of the issuance of

securities shall constitute approval only as to the legality of the issue, and in no way shall it be considered commission approval of the rates, service, accounts, valuation, estimates, or determinations of cost or any other such matter. The jurisdiction conferred upon the commission shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail.

(2) In the exercise of its jurisdiction, the commission shall have power over rural electric cooperatives and municipal electric utilities for the following purposes:

(a) To prescribe uniform systems and classifications of accounts.

(b) To prescribe a rate structure for all electric utilities.

(c) To require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes.

(d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. However, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements.

(e) To resolve any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of

urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

(f) To prescribe and require the filing of periodic reports and other data as may be reasonably available and as necessary to exercise its jurisdiction hereunder.

No provision of this chapter shall be construed or applied to impede, prevent, or prohibit any municipally owned electric utility system from distributing at retail electrical energy within its corporate limits, as such corporate limits exist on July 1, 1974; however, existing territorial agreements shall not be altered or abridged hereby.

(3) The commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

(4) The commission shall further have exclusive jurisdiction to prescribe and enforce safety standards for transmission and distribution facilities of all public electric utilities, cooperatives organized under the Rural Electric Cooperatives Law, and electric utilities owned and operated by municipalities. In adopting safety standards, the commission shall:

(a) Adopt the 1984 edition of the National Electrical Safety Code (ANSI C2) as initial standards; and

(b) Adopt, after review, any new edition of the National Electrical Safety Code (ANSI C2).

The standards prescribed by the current 1984 edition of the National Electrical Safety Code (ANSI C2) shall constitute acceptable and adequate requirements for the protection of the safety of the public, and compliance with the minimum

requirements of that code shall constitute good engineering practice by the utilities. The administrative authority referred to in the 1984 edition of the National Electrical Safety Code is the commission. However, nothing herein shall be construed as superseding, repealing, or amending the provisions of s. 403.523(1) and (14).

History.—s. 4, ch. 26545, 1951; s. 1, ch. 63-288; s. 1, ch. 63-279; s. 1, ch. 65-52; s. 1, ch. 74-196; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 3, 16, ch. 80-35; s. 2, ch. 81-318; s. 4, ch. 86-173.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81-318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]366.041 Rate fixing; adequacy of facilities as criterion.—

(1) In fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all public utilities under its jurisdiction, the commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public; the ability of the utility to improve such service and facilities; and energy conservation and the efficient use of alternative energy resources; provided that no public utility shall be denied a reasonable rate of return upon its rate base in any order entered pursuant to such proceedings. In its consideration thereof, the commission shall have authority, and it shall be the commission's duty, to hear service complaints, if any, that may be presented by subscribers and the public during any proceedings involving such rates, charges, fares, tolls, or rentals; however, no service complaints shall be taken up or considered by the commission at any proceedings involving rates, charges, fares, tolls, or rentals unless the utility has been given at least 30 days' written notice thereof, and any proceeding may be extended, prior to final determination, for such period; further, no order hereunder shall be made

effective until a reasonable time has been given the utility involved to correct the cause of service complaints, considering the factor of growth in the community and availability of necessary equipment.

(2) The power and authority herein conferred upon the commission shall not cancel or amend any existing punitive powers of the commission but shall be supplementary thereto and shall be construed liberally to further the legislative intent that adequate service be rendered by public utilities in the state in consideration for the rates, charges, fares, tolls, and rentals fixed by said commission and observed by said utilities under its jurisdiction.

(3) The term "public utility" as used herein means all persons or corporations which the commission has the authority, power, and duty to regulate for the purpose of fixing rates and charges for services rendered and requiring the rendition of adequate service.

History.—ss. 1, 2, 3, 4, ch. 67–326; s. 3, ch. 76–168; s. 1, ch. 77–457; s. 53, ch. 78–95; ss. 4, 16, ch. 80–35; s. 2, ch. 81–318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]366.05 Powers.—

(1) In the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility; to require repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto; to employ and fix the compensation for such examiners and technical, legal, and clerical employees as it deems necessary to carry out the provisions of this chapter; and to prescribe all rules and regulations reasonably

necessary and appropriate for the administration and enforcement of this chapter.

(2) Every public utility, as defined in s. 366.02, which in addition to the production, transmission, delivery or furnishing of heat, light, or power also sells appliances or other merchandise shall keep separate and individual accounts for the sale and profit deriving from such sales. No profit or loss shall be taken into consideration by the commission from the sale of such items in arriving at any rate to be charged for service by any public utility.

(3) The commission shall provide for the examination and testing of all meters used for measuring any product or service of a public utility.

(4) Any consumer or user may have any such meter tested upon payment of the fees fixed by the commission.

(5) The commission shall establish reasonable fees to be paid for testing such meters on the request of the consumers or users, the fee to be paid by the consumer or user at the time of his request, but to be paid by the public utility and repaid to the consumer or user if the meter is found defective or incorrect to the disadvantage of the consumer or user, in excess of the degree or amount of tolerance customarily allowed for such meters, or as may be provided for in rules and regulations of the commission.

(6) The commission may purchase materials, apparatus, and standard measuring instruments for such examination and tests.

(7) The commission shall have the power to require reports from all electric utilities to assure the development of adequate and reliable energy grids.

(8) If the commission determines that there is probable cause to believe that inadequacies exist with respect to the energy grids developed by the electric utility industry, it shall have the power, after proceedings as

provided by law, and after a finding that mutual benefits will accrue to the public utilities involved, to require installation or repair of necessary facilities, including generating plants and transmission facilities, with the costs to be distributed in proportion to the benefits received, and to take all necessary steps to ensure compliance. The electric utilities involved in any action taken or orders issued pursuant to this subsection shall have full power and authority, notwithstanding any general or special laws to the contrary, to jointly plan, finance, build, operate, or lease generating and transmission facilities and shall be further authorized to exercise the powers granted to corporations in chapter 361. This subsection shall not supersede or control any provision of the Electric Power Plant Siting Act, ss. 403.501–403.515.

(9) The commission may establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers and may set the rates at which a public utility shall purchase power or energy from a cogenerator or small power producer.

History.—s. 5, ch. 26545, 1951; s. 2, ch. 74–196; s. 3, ch. 76–168; s. 1, ch. 77–457; s. 53, ch. 78–95; ss. 5, 16, ch. 80–35; s. 1, ch. 81–131; s. 2, ch. 81–318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]366.055 Availability of, and payment for, energy reserves.—

(1) Energy reserves of all utilities in the Florida energy grid shall be available at all times to ensure that grid reliability and integrity are maintained. The commission is authorized to take such action as is necessary to assure compliance. However, prior commitments as to energy use:

(a) In interstate commerce, as approved by the Federal Energy Regulatory Commission;

(b) Between one electric utility and another, which have been approved by the Federal Energy Regulatory Commission; or

(c) Between an electric utility which is a part of the energy grid created herein and another energy grid shall not be abridged or altered except during an energy emergency as declared by the Governor and Cabinet.

(2)(a) When the energy produced by one electric utility is transferred to another or others through the energy grid and under the powers granted by this section, the commission shall direct the appropriate recipient utility or utilities to reimburse the producing utility in accordance with the latest wholesale electric rates approved for the producing utility by the Federal Energy Regulatory Commission for such purposes.

(b) Any utility which provides a portion of those transmission facilities involved in the transfer of energy from a producing utility to a recipient utility or utilities shall be entitled to receive an appropriate reimbursement commensurate with the transmission facilities and services provided. However, no utility shall be required to sell purchased power to a recipient utility or utilities at a rate lower than the rate at which the power is purchased from a producing utility.

(3) To assure efficient and reliable operation of a state energy grid, the commission shall have the power to require any electric utility to transmit electrical energy over its transmission lines from one utility to another or as a part of the total energy supply of the entire grid, subject to the provisions hereof.

History.—s. 3, ch. 74–196; s. 3, ch. 76–168; s. 1, ch. 77–457; ss. 6, 16, ch. 80–35; s. 2, ch. 81–318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]366.06 Rates; procedure for fixing and changing.—

(1) A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule. All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service. The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor. In fixing fair, just, and reasonable rates for each customer class, the commission shall, to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the utility; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures.

(2) Whenever the commission shall find, upon request made or upon its own motion, that the rates demanded, charged, or collected by any public utility company for public utility service, or that the rules, regulations, or practices of any public utility company affecting such rates, are unjust, unreasonable, unjustly discriminatory, or in violation of law; or that such rates are insufficient to yield reasonable compensation for the services rendered; or that

such service is inadequate or cannot be obtained, the commission shall order and hold a public hearing, giving notice to the public and to the utility company, and shall thereafter determine just and reasonable rates to be thereafter charged for such service and promulgate rules and regulations affecting equipment, facilities, and service to be thereafter installed, furnished, and used.

(3) Pending a final order by the commission in any rate proceeding under this section, the commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the utility requesting such increase, within 60 days, a reason or written statement of good cause for withholding its consent. Such consent shall not be withheld for a period longer than 8 months from the date of filing the new schedules. The new rates or any portion not consented to shall go into effect under bond or corporate undertaking at the end of such period, but the commission shall, by order, require such utility to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid and, upon completion of hearing and final decision in such proceeding, shall by further order require such utility to refund with interest at a fair rate, to be determined by the commission in such manner as it may direct, such portion of the increased rate or charge as by its decision shall be found not justified. Any portion of such refund not thus refunded to patrons or customers of the utility shall be refunded or disposed of by the utility as the commission may direct; however, no such funds shall accrue to the benefit of the utility. The commission shall take final commission action in the docket and enter its final order within 12 months of the commencement date for final agency action. As used in this subsection, the "commencement date for final agency action" means the date upon which it has been determined by the commission or its designee that the utility has filed with the clerk the minimum filing requirements as established by rule of the commission. Within 30 days after

receipt of the application, rate request, or other written document for which the commencement date for final agency action is to be established, the commission or its designee shall either determine the commencement date for final agency action or issue a statement of deficiencies to the applicant, specifically listing why said applicant has failed to meet the minimum filing requirements. Such statement of deficiencies shall be binding upon the commission to the extent that, once the deficiencies in the statement are satisfied, the commencement date for final agency action shall be promptly established as provided herein. Thereafter, within 15 days after the applicant indicates to the commission that it believes that it has met the minimum filing requirements, the commission or its designee shall either determine the commencement date for final agency action or specifically enumerate in writing why the requirements have not been met, in which case this procedure shall be repeated until the commencement date for final agency action is established. When the commission initiates a proceeding, the commencement date for final agency action shall be the date upon which the order initiating the proceeding is issued.

History.—s. 6, ch. 26545, 1951; s. 4, ch. 74–195; s. 3, ch. 76–168; s. 1, ch. 77–457; ss. 7, 16, ch. 80–35; s. 2, ch. 81–318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of that date.
cf—s. 364.05 Changing rates, tolls, rentals, etc.
s. 367.081 Rates; procedure for fixing and changing.

[1]**366.07 Rates; adjustment.**—Whenever the commission, after public hearing either upon its own motion or upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, or the rules, regulations, measurements, practices or contracts, or any of them, relating thereto, are unjust, unreasonable, insufficient, or unjustly discriminatory or preferential, or in anywise in

violation of law, or any service is inadequate or cannot be obtained, the commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, practices, contracts or service, to be imposed, observed, furnished or followed in the future.

History.—s. 7, ch. 26545, 1951; s. 24, ch. 57-1; s. 3, ch. 76-168; s. 1, ch. 77-457; s. 16, ch. 80-35; s. 2, ch. 81-318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81-318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]366.071 Interim rates; procedure.—

(1) The commission may, during any proceeding for a change of rates, upon its own motion, or upon petition from any party, or by a tariff filing of a public utility, authorize the collection of interim rates until the effective date of the final order. Such interim rates may be based upon a test period different from the test period used in the request for permanent rate relief. To establish a prima facie entitlement for interim relief, the commission, the petitioning party, or the public utility shall demonstrate that the public utility is earning outside the range of reasonableness on rate of return calculated in accordance with subsection (5).

(2)(a) In a proceeding for an interim increase in rates, the commission shall authorize, within 60 days of the filing for such relief, the collection of rates sufficient to earn the minimum of the range of rate of return calculated in accordance with subparagraph (5)(b)2. The difference between the interim rates and the previously authorized rates shall be collected under bond or corporate undertaking subject to refund with interest at a rate ordered by the commission.

(b) In a proceeding for an interim decrease in rates, the commission shall authorize, within 60 days of the filing for such relief, the continued collection of the previously authorized rates; however, revenues collected under those

rates sufficient to reduce the achieved rate of return to the maximum of the range of rate of return calculated in accordance with subparagraph (5)(b)2. shall he placed under bond or corporate undertaking subject to refund with interest at a rate ordered by the commission.

(c) The commission shall determine whether a corporate undertaking may be filed in lieu of the bond.

(3) In granting such relief, the commission may, in an expedited hearing but within 60 days of the commencement of the proceeding, upon petition or upon its own motion, preclude the recovery of any extraordinary or imprudently incurred expenditures or, for good cause shown, increase the amount of the bond or corporate undertaking.

(4) Any refund ordered by the commission shall be calculated to reduce the rate of return of the public utility during the pendency of the proceeding to the same level within the range of the newly authorized rate of return which is found fair and reasonable on a prospective basis, but the refund shall not be in excess of the amount of the revenues collected subject to refund and in accordance with paragraph (2)(b). In addition, the commission may require interest on the refund at a rate established by the commission.

(5)(a) In setting interim rates or setting revenues subject to refund, the commission shall determine the revenue deficiency or excess by calculating the difference between the achieved rate of return of a public utility and its required rate of return applied to an average investment rate base or an end-of-period investment rate base.

(b) For purposes of this subsection:

1. "Achieved rate of return" means the rate of return earned by the public utility for the most recent 12-month period. The achieved rate of return shall be calculated by applying appropriate adjustments consistent with those

which were used in the most recent rate case of the public utility and annualizing any rate changes occurring during such period.

2. "Required rate of return" shall be calculated as the weighted average cost of capital for the most recent 12-month period, using the last authorized rate of return on equity of the public utility, the current embedded cost of fixed-rate capital, the actual cost of short-term debt, the actual cost of variable-cost debt, and the actual cost of other sources of capital which were used in the last rate case of the public utility.

3. In a proceeding for an interim increase, the term "last authorized rate of return on equity" used in subparagraph 2. means the minimum of the range of the last authorized rate of return on equity established in the most recent rate case of the public utility. In a proceeding for an interim decrease, the term "last authorized rate of return on equity" used in subparagraph 2. means the maximum of the range of the last authorized rate of return on equity established in the most recent rate case of the public utility.

History.—s. 8, ch. 80–35; s. 2, ch. 81–318; ss. 3, 15, ch. 82–25.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of that date. Expires October 1, 1989, pursuant to s. 15 ch. 82–25, and is scheduled for review pursuant to s. 1161 in advance of that date.

[1]**366.072 Rate adjustment orders.**—Any order issued by the commission adjusting general increases or reductions of the rates of an electric or gas company shall be reduced to writing including any dissenting or concurring opinions within 20 days of the official vote of the commission. Within said 20 days, the commission shall also mail a copy of the order to the clerk of the circuit court of each county in which customers are served who are affected by the rate adjustment, which copy shall be kept on file and made available to the public. The commission shall notify all parties of record in the proceeding of the date of such

mailing. Such an order shall not be considered rendered for purposes of appeal, rehearing, or judicial review until the date the copies are mailed as required by this section. This provision shall not delay the effective date of the order. Such an order shall be considered rendered on the date of the official vote for the purposes of ss. 364.05(4) and 366.06(4).

History.—s. 1, ch. 78–137; s. 10, ch. 80–35; s. 2, ch. 81–318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]366.075 Experimental and transitional rates.—

(1) The commission is authorized to approve rates on an experimental or transitional basis for any public utility to encourage energy conservation or to encourage efficiency. The application of such rates may be for limited geographic areas and for a limited period.

(2) The commission is authorized to approve the geographic area used in testing experimental rates and shall specify in the order setting those rates the area affected. The commission may extend the period designated for the test if it determines that further testing is necessary to fully evaluate the effectiveness of such experimental rates.

History.—s. 9, ch. 80–35; s. 2, ch. 81–318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of the date.

366.076 Limited proceedings; rules on subsequent adjustments.—

(1) Upon petition or its own motion, the commission may conduct a limited proceeding to consider and act upon any matter within its jurisdiction, including any matter the resolution of which requires a public utility to adjust its rates to consist with the provisions of this chapter. The commission shall determine the issues to be considered during such a proceeding and may grant or deny any request

to expand the scope of the proceeding to include other matters.

(2) The commission may adopt rules for the determination of rates in full revenue requirement proceedings which rules provide for adjustments of rates based on revenues and costs during the period new rates are to be in effect and for incremental adjustments in rates for subsequent periods.

History.—s. 13, ch. 83-222.

[1]366.08 Investigations, inspections; power of commission.—The commission or its duly authorized representatives may during all reasonable hours enter upon any premises occupied by any public utility and may set up and use thereon all necessary apparatus and appliances for the purpose of making investigations, inspections, examinations and tests and exercising any power conferred by this chapter; provided, such public utility shall have the right to be notified of and be represented at the making of such investigations, inspections, examinations and tests.

History.—s. 8, ch. 26545, 1951; s. 3, ch. 76-168; s. 1, ch. 77-457; s. 16, ch. 80-35; s. 2, ch. 81-318.

[1]Note.—Repealed effective October 1, 1989, by s. 2, ch. 81-318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]366.09 Incrimination at hearing of commission.—Any person called upon to testify before the commission or one of its examiners shall not be excused from answering on the ground or claim that his testimony would tend to incriminate himself; but no person having so testified shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may have testified or produced documentary evidence provided that no person so testifying shall be exempted from prosecution or punishment for perjury in so testifying.

History.—s. 9, ch. 26545, 1951; s. 3, ch. 76-168; s. 1, ch. 77-457; s. 16, ch. 80-35; s. 2, ch. 81-318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81-318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]366.093 Public utility records; confidentiality.—

(1) The commission shall continue to have reasonable access to all public utility records. Upon request of the public utility, any records received by the commission which are shown to be proprietary confidential business information shall be kept confidential and shall be exempt from s. 119.07(1).

(2) In any docket or proceeding before the commission, the commission shall issue protective orders protecting a public utility from discovery of proprietary confidential business information, upon a showing by the public utility that such protection is necessary. However, if the commission determines that discovery of proprietary confidential business information is necessary to protect the public interest, the commission shall enter an order limiting such discovery in the manner provided for in Rule 1.280 of the Florida Rules of Civil Procedure. Such proprietary confidential business information shall be exempt from s. 119.07(1).

(3) Proprietary confidential business information includes, but is not limited to:

(a) Trade secrets.

(b) Internal auditing controls and reports of internal auditors.

(c) Security measures, systems, or procedures.

(d) Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility to contract for services on favorable terms.

(e) Employee personnel information unrelated to compensation, duties, qualifications, or responsibilities.

History.—ss. 2, 15, ch. 82–25.

[1]**Note.**—Repealed effective October 1, 1989, by s. 15, ch. 82–25, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]**366.095 Penalties.**—The commission shall have the power to impose upon any entity subject to its jurisdiction under this chapter that is found to have refused to comply with or to have willfully violated any lawful rule or order of the commission or any provision of this chapter a penalty for each offense of not more than $5,000, which penalty shall be fixed, imposed, and collected by the commission; or the commission may, for any such violation, amend, suspend, or revoke any certificate issued by the commission. Each day that such refusal or violation continues shall constitute a separate offense. Each penalty shall be a lien upon the real and personal property of the entity, enforceable by the commission as a statutory lien under chapter 85.

History.—ss. 2, 15, ch. 82–25.

[1]**Note.**—Repealed effective October 1, 1989, by s. 15, ch. 82–25, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]**366.10 Judicial review.**—As authorized by s. 3(b)(2), Art. V of the State Constitution, the Supreme Court shall review, upon petition, any action of the commission relating to rates or service of utilities providing electric or gas service.

History.—s. 10, ch. 26545, 1951; s. 3, ch. 76–168; s. 1, ch. 77–457; ss. 11, 16, ch. 80–35; s. 2, ch. 81–318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]**366.11 Certain exemptions.**—

(1) No provision of this chapter shall apply in any manner, other than as specified in ss. 366.04(2) and (3),

366.05(7) and (8), and 366.055, to utilities owned and operated by municipalities, whether within or without any municipality, or by cooperatives organized and existing under the Rural Electrification Cooperative Law of the state, or to the sale of electricity, manufactured gas, or natural gas at wholesale by any public utility to, and the purchase by, any municipality or cooperative under and pursuant to any contracts now in effect or which may be entered into in the future, when such municipality or cooperative is engaged in the sale and distribution of electricity or manufactured or natural gas, or to the rates provided for in such contracts.

(2) Nothing herein shall restrict the police power of municipalities over their streets, highways, and public places or the power to maintain or require the maintenance thereof or the right of a municipality to levy taxes on public services under s. 166.231 or affect the right of any municipality to continue to receive revenue from any public utility as is now provided or as may be hereafter provided in any franchise.

History.—s. 11, ch. 26545, 1951; s. 5, ch. 74–196; s. 3, ch. 76–168; s. 7, ch. 76–265; s. 108, ch. 77–104; s. 1, ch. 77–457; ss. 12, 16, ch. 80–35; s. 217, ch. 81–259; s. 2, ch. 81–318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]**366.125 Natural gas jurisdiction limits.**—Any provision of this chapter to the contrary notwithstanding, the jurisdiction of the commission over the sale of natural gas shall not extend beyond the outlet of the customer's meter set assembly when the means of delivery of natural gas is other than by pipeline.

History.—ss. 4, 15, ch. 82–25.

[1]**Note.**—Repealed effective October 1, 1989, by s. 15, ch. 82–25, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]**366.13 Taxes, not affected.**—No provision of this chapter shall in any way affect any municipal tax or franchise tax in any manner whatsoever.

History.—s. 13A, ch. 26545, 1951; s. 3, ch. 76-168; s. 1, ch. 77-457; s. 16, ch. 80-35; s. 2, ch. 81-318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81-318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]366.135 Existing rates; pending proceedings.—

(1) This act shall not be construed to cause to be unlawful any rate which has been previously approved and which is lawfully being charged and collected immediately prior to July 1, 1980. However, no such rate may be changed on or after July 1, 1980, except in accordance with the provisions of this act.

(2) Proceedings including judicial review pending on July 1, 1980, shall be governed by the law as it existed immediately prior to July 1, 1980. Administrative adjudicatory proceedings, however, which have not progressed to the stage of a hearing may, with the consent of all parties and the commission, be conducted in accordance with the provisions of this act.

History.—s. 13, ch. 80-35; s. 2, ch. 81-318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81-318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]366.80 Short title.—Sections 366.80-366.85 and 403.519 shall be known and may be cited as the "Florida Energy Efficiency and Conservation Act."

History.—s. 5, ch. 80-65; s. 2, ch. 81-318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81-318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]366.81 Legislative findings and intent.—The Legislature finds and declares that it is critical to utilize the most efficient and cost-effective energy conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens. Reduction in the growth rates of electric consumption and of weather-sensitive peak demand are of particular importance. The Legislature

further finds that the Florida Public Service Commission is the appropriate agency to adopt goals and approve plans related to the conservation of electric energy and natural gas usage. The Legislature directs the commission to develop and adopt overall goals and authorizes the commission to require each utility to develop a plan for increasing energy efficiency and conservation within its service area, subject to the approval of the commission. Since solutions to our energy problems are complex, the Legislature intends that the use of solar energy, renewable energy sources, highly efficient systems, and load-control systems be encouraged. Accordingly, in exercising its jurisdiction, the commission shall not approve any rate or rate structure which discriminates against any class of customers on account of the use of such systems or devices. This expression of legislative intent shall not be construed to preclude experimental rates, rate structures, or programs. The Legislature further finds and declares that ss. 366.80–366.85 and 403.519 are to be liberally construed in order to meet the complex problems of reducing the growth rates of electric consumption and weather-sensitive peak demand; increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use; and conserving expensive resources, particularly petroleum fuels.

History.—s. 5, ch. 80–65; s. 2, ch. 81–318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]366.82 Definition; goals; plans; annual reports; energy audits.—

(1) For the purposes of ss. 366.80–366.85 and 403.519, "utility" means any person or entity of whatever form which provides electricity or natural gas at retail to the public, specifically including municipalities or instrumentalities thereof and cooperatives organized under the Rural Electric Cooperative Law and specifically excluding any person or

entity providing natural gas at retail to the public whose annual sales volume is less than 100 million therms.

(2) The commission shall adopt appropriate goals for increasing the efficiency of energy consumption, specifically including goals designed to increase the conservation of expensive resources, such as petroleum fuels, and to reduce the growth rates of electric consumption, especially of weather-sensitive peak demand. The Executive Office of the Governor shall be a party in the proceedings to adopt goals. The initial goals shall be adopted no later than September 1, 1980, for the succeeding 5-year period. The commission may change the initial goals for reasonable cause and may reset the time period for accomplishing the goals. After the programs and plans to meet those goals are completed, the commission shall determine whether further goals, programs, or plans are warranted and, if so, shall adopt them.

(3) Following adoption of goals pursuant to subsection (2), the commission shall require each utility to develop a plan to meet the overall goals within its service area. If any plan includes loans, collection of loans, or similar banking functions by a utility and the plan is approved by the commission, the utility shall perform such functions, notwithstanding any other provision of the law. The commission may pledge up to $5,000,000 of the Florida Public Service Regulatory Trust Fund to guarantee such loans. However, no utility shall be required to loan its funds for the purpose of purchasing or otherwise acquiring conservation measures or devices, but nothing herein shall prohibit or impair the administration or implementation of a utility plan as submitted by a utility and approved by the commission under this subsection. Plans to meet the initial goals must be submitted to the commission no later than November 1, 1980. The commission shall approve or disapprove each plan no later than December 1, 1980. If the commission disapproves a plan, it shall specify the reasons

for disapproval, and the utility whose plan is disapproved shall resubmit its modified plan within 30 days. Each plan shall commence January 1, 1981. Prior approval by the commission shall be required to modify or discontinue a plan, or part thereof, which has been approved. If any utility has not implemented its plan and is not substantially in compliance with the provisions of its approved plan at any time after January 1, 1982, then the commission shall adopt a program which will be required for that utility to achieve the overall goals, which may include variations in rate design, load control, residential energy conservation subsidy, or any other measure within the jurisdiction of the commission which the commission finds likely to be effective; this provision shall not be construed to preclude these measures in any plan.

(4) The commission shall require periodic reports from each utility and shall provide the Legislature and the Governor with an annual report by March 1 of the goals it has adopted and its progress toward meeting those goals. The commission shall also consider the performance of each utility pursuant to ss. 366.80–366.85 and 403.519 when establishing rates for those utilities over which the commission has ratesetting authority.

(5) By January 1, 1981, the commission shall require each utility to offer, or to contract to offer, energy audits to its residential customers. This requirement need not be uniform, but may be based on such factors as level of usage, georaphic location, or any other reasonable criterion, so long as all eligible customers are notified by April 1, 1981. The commission may extend this requirement to some or all commercial customers if such audits are required pursuant to federal law. The commission shall set the charge for audits by rule, not to exceed the actual cost, and may describe by rule the general form and content of an audit. In the event one utility contracts with another utility to perform audits for it, the utility for which the audits are

performed shall pay the contracting utility the reasonable cost of performing the audits. Each utility over which the commission has ratesetting authority shall estimate its costs and revenues for audits, conservation programs, and implementation of its plan for the immediately following 6-month period. Reasonable and prudent unreimbursed costs projected to be incurred, or any portion of such costs, may be added to the rates which would otherwise be charged by a utility upon approval by the commission. Following each 6-month period, each utility shall report the actual results for that period to the commission, and the difference, if any, between actual and projected results shall be taken into account in succeeding periods. The state plan as submitted for consideration under the National Energy Conservation Policy Act shall not be in conflict with any state law or regulation.

(6) Notwithstanding the provisions of s. 377.703, the commission shall be the responsible state agency for performing, coordinating, implementing, or administering the functions of the state plan submitted for consideration under the National Energy Conservation Policy Act and any acts amendatory thereof or supplemental thereto and for performing, coordinating, implementing, or administering the functions of any future federal program delegated to the state which relates to consumption utilization, or conservation of electricity or natural gas; and the commission shall have exclusive responsibility for preparing all reports, information, analyses, recommendations, and materials related to consumption, utilization, or conservation of electrical energy which are required or authorized by s. 377.703.

(7) The commission shall establish all minimum requirements for energy auditors used by each utility. The commission is authorized to contract with any public agency or other person to provide any training, testing, evaluation,

or other step necessary to fulfill the provisions of this subsection.

History.—s. 5, ch. 80–65; s. 2, ch. 81–131; s. 2, ch. 81–318; ss. 5, 15, ch. 82–25.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of that date. Expires October 1, 1989, pursuant to s. 15, ch. 82–25, and is scheduled for review pursuant to s. 11.61 in advance of that date.

[1]**366.83 Certain laws not applicable; saving clause.** No utility shall be held liable for the acts or omissions of any person in implementing or attempting to implement those measures found cost-effective by, or recommended as a result of, an energy audit. The findings and recommendations of an energy audit shall not be construed to be a warranty or guarantee of any kind, nor shall such findings or recommendations subject the utility to liability of any kind. Nothing in ss. 366.80–366.85 and 403.519 shall preempt or affect litigation pending on June 5, 1980, nor shall ss. 366.80–366.86 and 403.519 preempt federal law unless such preemption is expressly authorized by federal statute.

History.—s. 5, ch. 80–65; s. 2, ch. 81–318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81–318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]**366.84 Trust fund created; uses.**—There is created the Florida Energy Trust Fund. The commission may develop a test program which shall be conducted in the service area of one or more utilities to improve the efficiency of energy usage by retrofitting existing housing, and the commission may subsidize loans for this purpose. The commission may also provide moneys from the fund for educational projects designed to increase public awareness of the need for efficient utilization of electricity and natural gas or to develop and demonstrate appropriate technology for such purposes.

History.—s. 5, ch. 80-65; s. 2, ch. 81-318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81-318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]**366.85 Responsibilities of Division of Consumer Services.**—The Division of Consumer Services of the Department of Agriculture and Consumer Services shall be the agency responsible for consumer conciliatory conferences, if such conferences are required pursuant to federal law. The division shall also be the agency responsible for preparing lists of sources for energy conservation products or services and of financial institutions offering energy conservation loans, if such lists are required pursuant to federal law. Notwithstanding any provision of federal law to the contrary, the division shall not require any manufacturer's warranty exceeding 1 year in order for a source of conservation products or services to be included on the appropriate list. The lists shall be prepared for the service area of each utility and shall be furnished to each utility for distribution to its customers. The division shall update the lists on a systematic basis and shall remove from any list any person who has been disciplined by any state agency or who has otherwise exhibited a pattern of unsatisfactory work and any person who requests removal from such lists. The division is authorized to adopt rules to implement the provisions of this section.

History.—s. 5, ch. 80-65; s. 2, ch. 81-318.

[1]**Note.**—Repealed effective October 1, 1989, by s. 2, ch. 81-318, and scheduled for review pursuant to s. 11.61 in advance of that date.

Appendix I

APPENDIX I

BEFORE THE FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION

DOCKET NO. 6231-GU

ORDER NO. 3051

In re: Territorial Agreement between Peoples Gas System, Inc. and City Gas Company of Florida.

ORDER APPROVING AGREEMENT

BY THE COMMISSION:

Peoples Gas System, Inc. and City Gas Company of Florida are gas public utilities operating under the jurisdiction of the Florida Railroad and Public Utilities Commission pursuant to Chapter 366, Florida Statutes. Said utilities have filed with this Commission a copy of a Territorial Agreement entered into between them on September 9, 1960. The Territorial Agreement is an agreement between said companies as to the territorial service area boundary between said two companies in Dade and Broward Counties, Florida. Its approval is requested by the Commission.

Chapter 366, Florida Statutes, does not authorize the Commission to grant franchises or certificates of public convenience and necessity to electric and gas public utilities. The Commission's jurisdiction under said chapter extends to the rates, service, and the issuance and sale of certain securities of public utilities as defined therein. In the exercise of this jurisdiction, the Commission is specifically authorized to require repairs, improvements, additions and extensions to the plant and equipment of any public utility reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto. Obviously, any agreement between two gas utilities which has for its

purpose the establishing of service areas between the utilities will, in effect, limit to some extent the Commission's power to require additions and extensions to plant and equipment reasonably necessary to secure adequate service to those reasonably entitled thereto. In our opinion, such a limitation can have no validity without the approval of this Commission.

It is our opinion that territorial agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities which invariably accompany expansions into areas already served by a competing utility, are definitely in the public interest and should be encouraged and approved by an agency such as this, which is charged with the duty of regulating public utilities in the public interest. Duplication of public utility facilities is an economic waste and results in higher rates which the public must pay for essential services. Reasonable and realistic regulation, in such cases, is better than, and takes the place of competition. A public utility is entitled under the law to earn a reasonable return on its investment. If two similar utilities enter the same territory and compete for the limited business of the area, each will have fewer customers, but there inevitably will be excess facilities which must earn a reasonable return. The rates in such a situation will be higher than the service is worth, or customers in more remote areas will bear some of the unjustified expense necessary to support such economic waste. In the absence of a specific statute limiting the service areas of various public utilities, territorial agreements such as we are concerned with here, constitute no unreasonable restriction on the Commission's powers, but actually assist the Commission in the performance of its primary function of procuring for the public essential utility services at reasonable costs.

Based upon our study of the Territorial Agreement under consideration and the circumstances surrounding the execution of said agreement, it is our opinion that said

agreement is in the public interest and should be approved by this Commission.

NOW, THEREFORE, IN CONSIDERATION THEREOF, it is

ORDERED by the Florida Railroad and Public Utilities Commission that the Territorial Agreement between Peoples Gas System, Inc. and City Gas Company of Florida as of September 9, 1960, be and the same is hereby approved.

By Order of Chairman Jerry W. Carter, Commissioner Wilbur C. King, and Commissioner Edwin L. Mason, as and constituting the Florida Railroad and Public Utilities Commission, this 9th day of November, 1960.

/s/ [Illegible]
EXECUTIVE SECRETARY

(S E A L)
GPM

Supreme Court, U.S.
FILED
FEB 15 1991
OFFICE OF THE CLERK

(5)

No. 90-953

In the Supreme Court of the United States

October Term, 1990

CITY GAS COMPANY OF FLORIDA,
Petitioner

vs.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Eleventh Circuit below affirmed the holding of the district court that petitioner is liable for three separate and distinct violations of § 2 of the Sherman Act, 15 U.S.C. § 2. First, petitioner acquired and maintained monopoly power by virtue of an agreement with its only major competitor not to compete in each other's territory. Second, City Gas abused its monopoly power by refusing to deal with respondent, and this refusal violated § 2 under both the essential facilities doctrine and the intent to monopolize test. Third, City Gas engaged in a series of anti-competitive and predatory acts which, when viewed collectively, constituted an abuse of petitioner's monopoly power in violation of § 2.

Petitioner herein challenges the court's finding of liability under the essential facilities doctrine, contending that it does not possess monopoly power and that its pipelines do not constitute an essential facility. Petitioner also claims that the conduct held to constitute two of the three § 2 violations — *i.e.* the territorial agreement and the refusal to deal — is immune under the state action doctrine. Petitioner does not however, challenge the finding below that it violated § 2 by engaging in a pattern of anticompetitive conduct with the specific intent to monopolize. Because of this failure, a finding of monopoly power in this case mandates an affirmance of petitioner's liability. Thus, in large part, the questions presented by petitioner, even if resolved in petitioner's favor, would not change the outcome of this litigation. Nevertheless, as will be more fully clarified below, petitioner has seen fit to misrepresent crucial facts in its statement of questions

presented and, for that reason, the petitioner's questions are fairly restated as follows:

I. Whether the conclusion of the Eleventh Circuit that petitioner violated § 2 of the Sherman Act under the essential facilities doctrine warrants further review by this Court?

II. Whether the conclusion of the Eleventh Circuit that petitioner's conduct is not immune from antitrust liability under the state action doctrine warrants further review by this Court?

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STATEMENT OF THE CASE

Petitioner contends that the finding of antitrust liability upon multiple grounds under § 2 of the Sherman Act, first by the district court, then by a unanimous three judge panel of the Eleventh Circuit and, finally, by a majority of seven judges of the Eleventh Circuit sitting en banc, constitutes some sort of aberration and a "perversion" of applicable legal principles. This most emphatically is not so. Actually, the parties differ little in their views of the legal principles, it now appears to be the facts that petitioner places into dispute for the first time.

Crucial "facts" set forth in the petition and hence the statement of questions presented by petitioner bear no resemblance to the established facts of this case. Throughout the appellate process, petitioner has consistently asserted that it sought review only of the legal principles applied to the facts as found by the district court below. As the Eleventh Circuit noted in its panel opinion,[1] "[t]he district court's opinion contains a complete recitation of the facts and procedural history of this case . . . City Gas does not challenge the factual findings made by the district court . . ." [Pet. App. A-1, A-3]. When the well settled legal principles previously articulated by this Court are applied to what have throughout these proceedings been the unchallenged facts established by the district court,[2] it becomes clear that this case is fully in accord with settled antitrust principles and that there simply is no conflict with holdings of other circuit courts of appeal.

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[1] The panel opinion of the Eleventh Circuit was presented as petitioner's Appendix A and is referenced herein as such.

[2] The opinion of the district court was presented as petitioner's Appendix D and is referenced herein as such.

Respondent, Consolidated Gas Company of Florida, Inc. ("Consolidated"), is a retail distributor of liquid petroleum ("LP") gas in southern Dade County, Florida. Petitioner, City Gas Company of Florida ("City Gas") is a major distributor of natural gas in Florida, having approximately 100,000 customers. City Gas purchases natural gas from Florida Gas Transmission ("FGT"), the only *interstate pipeline* supplier of natural gas into Florida.[3]

Natural gas distributors are regulated public utilities. The Florida Public Service Commission ("FPSC") regulates the retail sales by natural gas distribution companies to residential and commercial customers. Although petitioner, at every conceivable opportunity throughout its petition, states that the rates, service and operation of Florida natural gas distributors are "pervasively regulated" by the FPSC, this again contravenes the facts City Gas agreed were uncontested. The district court found that the FPSC's regulation of natural gas distributors is not all-inclusive and that critical aspects of a natural gas distributor's business conduct either are not regulated at all by the FPSC or only are addressed on a hit-or-miss basis. Indeed, the evidence was uncontroverted that Florida's regulatory scheme is incomplete even with respect to rates as it does not constrain a

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[3] City Gas, in its petition, falsely states that it purchases all of its natural gas supply from FGT and mischaracterizes FGT as the "only wholesale supplier" of natural gas in Florida. This is not so. It was established that City Gas also purchases natural gas at wholesale from Peoples Gas System, Inc. ("Peoples") and that, as of the date of the trial, City Gas was party to a contract to sell natural gas at wholesale to Florida Gas on demand. The district court found that, within the relevant geographic market, City Gas was the only source of natural gas. FGT's pipelines outside of the relevant market are simply irrelevant to that finding.

utility's ability to exploit a monopolistic position. [Pet. App. D-7].

In 1960, City Gas entered into a territorial agreement with Peoples, its only *major* competitor. Under the terms of the agreement, City Gas and Peoples, the two largest natural gas companies in Florida, divided up south Florida into areas to be served by each and each company promised not to compete in the other's territory. While the agreement eliminated all competition between City Gas and Peoples, there were existing smaller natural gas companies within the service areas each reserved to itself which were left to compete with the two industry giants in those two territories. City Gas' pipes and its assumed service area totally surround Miller Gas, a smaller natural gas company inside the territory City Gas reserved to itself in the Peoples agreement. Consolidated Gas as well is totally surrounded by City Gas' pipes and self proclaimed service area.

The territorial agreement between City Gas and Peoples is the only one in the state between natural gas distributors. [Pet. App. A-11]. The agreement contains no provision making it contingent on FPSC approval but after it was placed into effect, FPSC approval was sought and later obtained. The district court found that the FPSC has regulated the agreement only on a hit-or-miss basis. Such an agreement is not required to be approved by the FPSC, it only is considered when a utility requests FPSC approval and it is subsequently reviewed only if a complaint is filed with the FPSC. [Pet. App. D-7]. In 1962, Peoples filed a circuit court action against City Gas alleging violation of the agreement. City Gas defended on the basis that the agreement was violative both of Florida's 1915 anti-monopoly law and the Sherman Act. The case proceeded through the state court system and, in

1965, the Florida supreme court held that the FPSC has implied power to validate such agreements. The court, however, refrained from addressing the applicability of the Sherman Act. *City Gas Co. v. Peoples Gas System, Inc.*, 182 So.2d 429 (Fla. 1965).

Because the same underground system used for LP gas distribution is suitable for natural gas distribution, an LP system located near a natural gas pipeline may be converted to natural gas on an economically feasible basis. By early 1982, City Gas had established a pattern of eliminating all potential competition by acquiring tiny LP companies located within its territory and preempting any efforts those companies may have made to convert to natural gas distribution. Because City Gas' pipelines surrounded the area served by these potential competitors, City Gas' acquisition strategy included installation of lines and conversion of some of the companies' LP customers to natural gas, reducing the revenues of the LP companies and leaving them with no choice but to sell their systems to City Gas at bargain prices.

On February 22, 1982, City Gas' Board of Directors was advised that City Gas was seeking to acquire Consolidated Gas and it authorized its officers to take whatever steps were necessary to acquire the assets of Consolidated. But Consolidated was not contacted by anyone at City Gas regarding City Gas' interest in purchasing the company. Instead, City Gas commenced its acquisition strategy the next day by beginning a full scale campaign to solicit away Consolidated's customers.

On March 9, 1982, Consolidated commenced its efforts to switch from LP gas to natural gas by contacting the FGT and requesting that the FGT construct the necessary connection facilities and supply it with natural

gas. Consolidated was advised that it was required to obtain a natural gas allocation from the FERC to buy direct from FGT and that it would be required to pay the cost of the interconnection, then estimated to be approximately $250,000.00. City Gas had received ten connections with the FGT without paying the costs and, to avoid this expenditure, FGT suggested that Consolidated arrange for a connection with City Gas' system.

On April 5, 1982, City Gas began extending its pipelines to serve some of Consolidated's customers. In so doing, City Gas duplicated Consolidated's pipelines serving those same customers. City Gas' solicitations and pipeline extensions to take selected customers from Consolidated were basic components of a strategy designed to force Consolidated to sell out at a low price, the same strategy that City Gas had successfully employed with respect to its other potential competitors.

On May 21, 1982, ~~City Gas~~ Consolidated applied to the FERC for a natural gas allocation. City Gas intervened in that proceeding, asserting numerous factual disputes that would otherwise not have been presented. City Gas also argued that, if Consolidated's application was granted, Consolidated should be required to pay the $250,000.00 cost of the FGT connection. The court found that City Gas' intervention raising factual disputes profoundly altered the course and nature of the consideration of Consolidated's application by the FERC, causing a delay in the proceedings of more than one year during which time City Gas took all but one of Consolidated's commercial customers and some of Consolidated's residential customers.[4]

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[4] City Gas violated its own approved tariff to take those customers. Its tariff required City Gas to charge contributions in aid of

During the course of the FERC proceedings, City Gas and Consolidated engaged in several discussions regarding the sale and/or transportation of natural gas by City Gas to Consolidated. Although City Gas had an existing contract in effect to sell natural gas at wholesale to Florida Gas on demand for cost plus one cent per therm, it demanded cost plus ten cents per therm from Consolidated for the same service. This offer was thereafter lowered to cost plus seven cents per therm. City Gas initially rejected the notion of transporting gas to Consolidated but thereafter offered to transport at cost plus seven cents per therm. City Gas' final offer was to purchase Consolidated's system at an artificially low price or to sell gas at cost plus seven cents per therm, retracting any offer to transport gas.

The price terms City Gas proposed for the sale or transportation of natural gas were found to be the functional equivalent of a refusal to deal at all as they were wholly unreasonable and bore no relationship to any economic calculation City Gas might have made regarding its costs of providing the service or its profits on the transaction. Indeed, City Gas provides numerous types of services to various classes of customers, and its has provided service to some customers that consume far larger volumes of gas than that required by Consolidated. Moreover, City Gas had a tremendous surplus supply of natural gas it could not sell to anyone else, Consolidated's requirements were less than 1.8% of City Gas' unused annual surplus and City Gas and would have had no opportunity costs in providing this service to Consoli-

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construction if expansion costs exceeded short term revenues to be received from the customers involved by a specified margin. City Gas did not charge the contributions its tariff required in order to take Consolidated's customers, thereby improperly requiring the rest of its customers to subsidize its unprofitable expansion.

dated. City Gas would have incurred only the minimal expense of opening and maintaining a new account on its books and of reading one additional meter on a monthly basis.

On November 21, 1983, the presiding administrative judge in the FERC proceedings granted Consolidated's application, rejecting City Gas' arguments in opposition. The FERC affirmed that decision on September 19, 1984, but it ruled that Consolidated should pay the cost of the lateral connection to FGT's pipeline. The district court found that the amortization of this capital cost would have increased Consolidated's cost of securing natural gas by approximately five cents per therm and that this payment by Consolidated at that point in time "would have been impractical and unreasonable and would have severely, if not fatally, handicapped Consolidated's potential entry into the natural gas market."[5] [Pet. App. D-73]. Because City Gas had refused to transport gas and a decision to pay for the lateral was not a competitively viable alternative at that juncture, Consolidated appealed, albeit unsuccessfully, that part of the FERC's decision.

This case was initiated by Consolidated in the Southern District of Florida against City Gas under § 2 of the Sherman Act. After a non-jury trial which consumed nine full days, the district court issued extensive and detailed findings of fact and conclusions of law, holding that City

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[5] Given this factual determination by the district court that was not challenged by City Gas, City Gas' contentions throughout its petition that Consolidated could have obtained natural gas from FGT upon "reasonable conditions" conflict with the factual findings. So too is it obviously inappropriate for City Gas to attempt inject new facts into the case and to speculate at this juncture as to Consolidated's ability to finance the $250,000.00 cost and still compete, something which is clearly contrary to the record.

Gas had violated § 2 of the Sherman Act under three separate and distinct theories of liability. First, City Gas acquired and maintained monopoly power by virtue of an unlawful territorial agreement with Peoples Gas. Second, City Gas willfully maintained and abused its monopoly power by unlawfully refusing to deal with Consolidated, thereby both denying Consolidated access to an essential facility and demonstrating an intent to monopolize in violation of §2. Third, City Gas engaged in a series of six anticompetitive and predatory acts with the specific intent to monopolize which, when viewed collectively, established City Gas' abuse of monopoly power in violation of § 2.[6] The Eleventh Circuit Court of Appeals affirmed the finding of liability on all three bases. But City Gas has not challenged the finding of liability upon the third basis, thereby mandating affirmance if the finding of monopoly power is upheld.

On appeal, City Gas expressly did not challenge any of the district court's factual findings, nor did it appeal the court's finding of liability under the intent to monopolize test. Rather, City Gas merely asserted that it does

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[6] The court below upheld the district court's determination that the following acts, when viewed collectively, demonstrated City Gas' intent to monopolize in violation of § 2: (1) agreeing with Peoples not to compete with each other in their respective territories; (2) refusing to sell or transport natural gas to Consolidated at a reasonable price; (3) attempting to purchase Consolidated and eliminate it as a potential competitor; (4) acquiring two other small competitors; (5) intervening in and opposing Consolidated's FERC allocation proceedings; (6) not charging Consolidated's customers the usual contribution in aid of construction in an effort to lure those customers away. [Pet. App. A-11]. The courts below also correctly recognized that Consolidated was not required to prove that any particular anticompetitive act of City Gas, viewed in isolation, itself constituted a § 2 violation. Rather, it was only incumbent upon Consolidated to prove that City Gas had engaged in an overall pattern of anticompetitive behavior. *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd* 472 U.S. 585 (1985).

not possess monopoly power and it further contended that two of the acts the courts below found to be anticompetitive and in violation of § 2 even standing alone — *i.e.* the territorial agreement and the refusal to deal — were immune from antitrust liability under the state action doctrine. City Gas assumes essentially the same position in its instant petition although, as demonstrated herein, it has now seen fit to misrepresent crucial facts that were established in the district court.

REASONS WHY THE PETITION SHOULD BE DENIED

As the district court noted, following thorough evaluation of the factual evidence presented, "City Gas quite apparently believed that because it was involved in a regulated industry, it had untrammeled authority to eliminate any potential competitor within its area of operation." [Pet. App. D-27]. This observation of the district court still accurately summarizes City Gas' position. That position, however, has been thoroughly explored and rejected by this Court on numerous occasions.

Applying well established legal principles to the facts of this case, it was determined by the district court, a determination now twice affirmed by the Eleventh Circuit, that City Gas willfully acquired and maintained monopoly power in the relevant market, that it abused its monopoly power with the *specific intent* to eliminate Consolidated as a potential competitor, and that its conduct is not immune from antitrust liability under the state action doctrine. This case relies heavily on its own facts and presents no significant question of unsettled law requiring this Court's attention. City Gas, in its petition, essentially requests that this Court engage in fact finding

anew and accept a version of the facts that differs radically from that established in the district court and considered by the court of appeals — a position that is wholly inappropriate at this juncture.

The undisputed factual findings of the district court mandate a finding of monopoly power in the relevant market and it is clear that the essential facilities and state action doctrines were straightforwardly applied to the facts of this case in accordance with decisions of this Court and those of other circuit courts. Neither the analysis employed nor the decision reached conflicts with holdings of other circuit courts of appeal. Indeed, because this case relies so heavily on its own facts, it involves no broad-ranging effect on anyone other than the parties.[7]

I

CITY GAS WAS FOUND TO HAVE VIOLATED § 2 OF THE SHERMAN ACT IN ACCORDANCE WITH ESTABLISHED PRECEDENT

City Gas does not dispute the determinations of the courts below that it engaged in a pattern of anticompetitive conduct specifically designed to destroy Consolidated as a potential competitor in violation of § 2. Rather, City Gas now contends, first, that the court's factual finding that it possesses monopoly power was erroneous; second, that, as a factual matter, its pipelines were erroneously

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[7] City Gas attempts to convey the impression that the finding of § 2 liability based on its territorial agreement with Peoples has great significance beyond the instant case. In fact, as the Eleventh Circuit noted, that agreement is the only territorial agreement between natural gas utilities in Florida and, thus, the decision affects no other utilities. [Pet. App. A-11]. Moreover, because § 2 liability was found on three separate grounds, one of which remains unchallenged, a reversal on this issue would not change the outcome of this case.

held to constitute an essential facility; and third, that two of its acts which the courts below held to be violative of § 2 even standing apart from the other violations found, are entitled to immunity under the state action doctrine. To reach the conclusions City Gas advocates would require this Court either to depart from well settled law or to disregard the facts of this case.

A. City Gas Possessed Monopoly Power

Monopoly power is, of course, the power to control prices in or exclude competition from some relevant market. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). The essential components of monopoly power — market definition and market power — are questions of fact. *United States v. E. I. DuPont de Nemours & Co.*, 118 F.Supp. 41, 197 (D.Del. 1953), aff'd 351 U.S. 377 (1956); *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), *cert. denied* 488 U.S. 870 (1988). The district court found that the relevant product market was comprised of natural gas and the geographic market consisted of City Gas' territory (within which is located Consolidated's service area) as well as the as yet unserved portions of southwest Dade County. [Pet. App. D-10]. This relevant market definition is uncontested.

On the facts of this case, there could have been no finding other than that City Gas possessed monopoly power in the relevant market based, not only its overwhelming market share, but also on the factual analysis performed of entry and exit barriers and on the examination of the realities of the regulatory scheme in place. Nevertheless, City Gas now disputes this finding by attempting to distinguish between the wholesale and retail

levels of the natural gas market and by asserting that it does not participate at the wholesale level.[8] This position both ignores the meaning of monopoly power and misstates the facts as they were established below. Moreover, as a practical matter, the distinction between wholesale and retail sales of natural gas by City Gas in the context of this case is one without any meaningful difference.

As a factual matter, City Gas' contention that it does not participate at the wholesale level of the natural gas market is, quite simply, untrue. It was established that City Gas is party to a contract wherein it agreed to sell natural gas to Florida Gas for resale upon its demand. This contract was approved by the Florida Public Service Commission and was still valid and in force at the time of trial.[9] In addition, City Gas negotiated to sell gas to

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[8] City Gas also contends that it lacks monopoly power at the retail level of the natural gas market by virtue of the fact that some aspects of its business are subject to regulation by the FERC and the FPSC. It is elementary, however, that "[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973). The district court found that "the fundamental realities of the situation are that City Gas has significant control over price and entrants to the retail market." [Pet.App. D-44]. City Gas' reliance on the mere existence of some regulation to overcome this finding obviously is misplaced. As the court noted in *Southern Pacific Communications Co. v. American Telephone & Telegraph Co.*, 740 F.2d 980, 1001 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985), if pricing and interconnection decisions are left to the defendant rather than to the regulatory agency in the first instance, as was found to be the case herein, then it cannot fairly be said, that a regulatory agency prevented a defendant from controlling price or excluding competition.

[9] Through his deposition taken in this case on September 18, 1985, less than one month before trial, Mr. Sidney W. Langer, Chairman of the Board and President of City Gas, testified as to City Gas' contract to sell gas for resale to Florida Gas upon its demand:

> Q. But that is actually a formal agreement that if they wanted to, you would sell it to them for one cent a therm?

Consolidated for resale. It was established in the district court that Peoples Gas sells natural gas to City Gas for resale in an area known as Breezeswept and that City Gas had the ability to sell gas for resale at will essentially without any regulatory intervention. [Pet. App. D-43]. Such wholesale rates between natural gas utilities are arrived at by the private entities, simply submitted to the FPSC for approval and, in such a situation, the FPSC does not pass on the reasonableness of the charge. [Pet. App. D-25, D-43]. Thus, the finding that City Gas had the *power* at the wholesale level to control price or exclude competition is a finding of fact that is well supported and undoubtedly sound.

City Gas now attempts to make much of the fact that it was never actually called upon to deliver gas for resale under its demand contract. This is a meaningless argument, however, that does not begin to address the real issue. As the Eleventh Circuit noted, "[t]he rather fortuitous circumstance ... that City Gas never actually sold any gas under this agreement does not obscure the fact that it had the *power* to do so." [Pet. App. A-5]. Indeed, within the relevant geographic market, the court found that City Gas was the *only* source of natural gas available to Consolidated, thereby mandating the conclusion that City Gas had power in this market.

Moreover, for City Gas to suggest that sales at "wholesale" somehow differ from sales at "retail" deliberately ignores the reality. As its own tariff demonstrated,

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A. That is right, including right this minute...

In this particular case, I guarantee you we had permission from the Public Service Commission to do this deal. Otherwise, it could never be done.

[P. Ex. M-0005 at p.174].

City Gas offered at least five different classes of service to its customers, all at varying rates. [P. Ex. D-0001]. The district court noted that, up until 1981, City Gas' largest industrial customer, Lonestar Cement, had been making annual natural gas purchases of approximately 27 million therms, as compared to the approximately one-half million therms that Consolidated required annually. [Pet. App. D-26].[10]. The court found that all that would have been involved in selling to Consolidated was opening and maintaining one new account on the books at the particular rate charged and reading one additional meter on a monthly basis. [Pet. App. D-24]. The process would be exactly the same as far as City Gas was concerned, regardless of whether sale of gas was to Consolidated or to any of its other approximately 100,000 smaller or larger customers.

There exists no viable basis upon which the finding of City Gas' monopoly power in the relevant market credibly can be challenged. Although City Gas claims that two of the three separate bases upon which § 2 liability was premised — *i.e.* the territorial agreement and refusal to deal — constitute conduct that is immune from antitrust liability, City Gas has never claimed this immunity defense is applicable to the third basis of liability — the pattern of anticompetitive conduct in which it engaged. As the district court found and the Eleventh Circuit affirmed, City Gas engaged in a series of predatory acts designed to eliminate competition which, when viewed

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[10] As the court found, prior to FERC's grant of a gas allocation to Consolidated, City Gas could have supplied gas to meet Consolidated's need by using only 1.8% of its *excess* annual gas supply it otherwise could not use. After Consolidated received an allocation, City Gas could have transported gas to Consolidated, thereby consuming none of its own allocation. [Pet. App. D-26].

collectively, constituted an abuse of monopoly power and provided a separate and distinct basis for imposition of § 2 liability. Thus, regardless of any other position asserted by City Gas, a finding of monopoly power mandates a finding of § 2 liability on this third ground.[11]

(B) The Essential Facilities Doctrine Was Properly Applied

When one reviews the district court's recitation of the facts of this case, it is difficult to conceive of a situation that falls more squarely within the essential facilities doctrine as articulated in *Otter Tail Power Co. v. United States,* 410 U.S. 336 (1973) and its progeny. Nevertheless, City Gas claims that the court's finding of § 2 liability under the essential facilities doctrine is erroneous on two levels. First, City Gas once again disputes the district court's factual finding that it participates in and has power at the wholesale level of the natural gas market and it claims that the essential facilities doctrine, therefore, is inapplicable because City Gas is not vertically integrated. Second, City Gas challenges the district court's factual finding that its pipelines were essential to Consolidated ability to compete. Neither of these positions has any merit whatsoever.

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[11]The law is well settled that even where a regulated industry has acquired monopoly power lawfully, it is nevertheless strictly accountable for its use of that power and may not abuse lawfully acquired monopoly power by engaging in anti-competitive conduct. *See e.g., Otter Tail Power, supra; United States v. American Tel. & Tel. Co.,* 524 F.Supp. 1336, 1347-48 (D. D.C. 1981); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers,* 241 F.Supp. 476, 485 (E.D. Mo. 1965), *aff'd* 368 F.2d 679 (8th Cir. 1966); *Greyhound Computer Corp., Inc. v. International Business Machines Corp.,* 559 F.2d 488, 498 (9th Cir. 1977), *cert. denied* 434 U.S. 1040 (1978). The courts below found and affirmed that City Gas abused its monopoly power, even if lawfully acquired, and that determination has not been challenged on appeal or in City Gas' instant petition.

City Gas relies upon Judge Tjoflat's dissenting opinion below to support its position that it is not vertically integrated because it does not operate at the wholesale level of the natural gas market. With all due respect to Judge Tjoflat, his dissenting analysis and conclusions are based on an erroneously stated factual background and on the erroneous premise that City Gas does not participate in the wholesale natural gas market and has never done so. Judge Tjoflat consistently refers to City Gas' contract to sell gas to Florida Gas for resale as having been "abandoned". That statement is unsupported and, indeed, is directly in conflict with the uncontested facts. As set forth above, it was established that the contract between City Gas and Florida Gas remained in force at the time of trial and City Gas' president testified that, had demand been made at that very moment, City Gas would have sold to Florida Gas pursuant to the contract.

Judge Tjoflat's vertical integration argument, upon which City Gas relies, is particularly inappropriate in the context of this case for another reason as well. City Gas attempts to convey the false impression that the decision below requires it to change the nature of its operations and to enter a market where its has never before participated. As explained above, City Gas already sells to at least five different classes of customers, all at different rates that have been approved by the FPSC, and the FPSC approved the rate at which City Gas contracted to sell to Florida Gas for its resale. Sale to Consolidated would not have entailed any change in City Gas' operations but merely would have added one new customer on its books and one more meter to read each month as the district court found. [Pet. App. D-24].

Finally, City Gas improperly takes issue with the factual finding below that its pipeline is an essential

facility — *i.e.* that duplication of the facility by Consolidated is economically infeasible and that denial of its use inflicts a severe handicap on Consolidated as a potential entrant into the natural gas market. *See Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied* 436 U.S. 956 (1978).[12] In cavalierly contending that Consolidated could easily have paid the $250,000.00 necessary to build the lateral connection to FGT, City Gas falsely states that the district court found that this expenditure would have increased Consolidated's market value by approximately $1.5 million. *The court found no such thing.* Rather, the district court found that the difference between what Consolidated's value would have been *in the absence of City Gas' actions* and its market value following City Gas' illegal conduct was approximately $1.5 million. [Pet. App. D-33].

Contrary to City Gas' unsupported contentions, the district court specifically found that, during 1982 and 1983, while it was seeking to compete for customers with City Gas and prior to 1984 when Consolidated received its FERC allocation, Consolidated could not have purchased natural gas for resale from anyone but City Gas. No other source was available while City Gas delayed the FERC proceedings. After 1984 when it received the FERC allocation, Consolidated could have also purchased from FGT had it expended $250,000.00 for a new gate station. But the Court found that City Gas had already taken all of Consolidated's commercial customers by that time and that such an expenditure, as a matter of fact, would then

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[12] As noted above, the courts below found that City Gas' refusal to deal with Consolidated on reasonable terms violated § 2, not only under the essential facilities doctrine, but also under the intent test. City Gas does not challenge the holding that its conduct demonstrates an intent to monopolize in violation of § 2.

have rendered it unable effectively to compete with City Gas. [Pet. App. D-72]. As the court found: "such duplication would have been impractical and unreasonable and would have severely, if not fatally, handicapped Consolidated's potential entry into the natural gas market." [Pet. App. D-731]. The test for finding a facility to be essential clearly has been met on the facts of this case and City Gas' attempt to change the facts at this juncture is improper and inappropriate.

II

CITY GAS' STATE ACTION DEFENSE WAS PROPERLY REJECTED IN ACCORDANCE WITH THIS COURT'S PRECEDENTS

City Gas claims that two of the three bases upon which it was found to have violated § 2 are entitled to immunity under the state action doctrine. Because no immunity is claimed as to the other violation found, the outcome of this case would necessarily remain unchanged even if City Gas' immunity argument is accepted. Nevertheless, City Gas' analysis of the immunity issue is flawed and, as with its other arguments, depends upon a factual recitation that is in direct conflict with those facts established in the district court below.

As this Court has clearly ruled, "a claim of immunity or exemption [from the antitrust laws] is in the nature of an affirmative defense." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 600 (1976). Repeals of the antitrust laws through implication from a state or federal regulatory scheme are not favored. *Cantor* at 596 n.34; *Otter Tail* at 391. Thus, the party asserting such an affirmative defense bears a heavy burden of making a "convincing showing of

clear repugnancy between the antitrust laws and the regulatory system." *Cantor* at 597, n.37.

Despite City Gas' deficiencies in both pleading and proof,[13] the district court engaged in a thorough analysis of the defense and found it inapplicable to City Gas' conduct in this case. For its otherwise illegal conduct to be immune from antitrust scrutiny, a regulated business must prove, first, that the conduct was undertaken pursuant to a "clearly articulated and affirmatively expressed" policy of the state to displace competition and, second, that the *conduct in question* is "actively supervised" by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). When this two prong test is accurately applied to the facts of this case, the conclusion is mandated that City Gas' conduct is not immune.

A. City Gas Failed to Satisfy the Clear Articulation Standard of the Midcal Test

Although City Gas does not claim immunity with respect to the pattern of anticompetitive conduct held to violate § 2 under the intent test, it does contend that the court below erred in finding that the first prong of the *Midcal* test was not satisfied as to its territorial agreement with Peoples and its refusal to deal with Consolidated viewed in isolation of its other actions. The test, however, was correctly applied to the facts of this case in accordance with decisions of this Court.

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[13] The district court noted that, while the state action exemption was not "squarely asserted" by City Gas, the issue was indeed serious and thus required thorough analysis. [Pet. App. D-50].

1. Territorial Agreement

City Gas' attack on application of the clear articulation test is twofold. First, City Gas states that the Florida Supreme Court ruled in *City Gas Co. v. Peoples Gas System, Inc.*, 182 So.2d 429 (Fla. 1965) that the Florida legislature intended for natural gas utilities to enjoy exclusive territorial agreements. The Florida Supreme Court, however, said no such thing. Second, City Gas states that dispositive of this case is this Court's pronouncement in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985) that "[a]s long as the state as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." This contention is based on an erroneous factual premise for which there is no support in the record.

In 1960 when City Gas and Peoples entered into their agreement not to compete in each other's territory, no Florida statute, rule or judicial decision authorized such agreements or provided any approval process. The territorial agreement did not provide that FPSC approval was necessary in order for it to become effective. However, sometime after City Gas and Peoples executed the agreement they requested and received FPSC approval. Some five years later, because City Gas and Peoples became embroiled in litigation over the agreement, the Florida Supreme Court ultimately considered it and held that the FPSC had implied authority to validate the agreement.

It is clear that an after-the-fact stamp of approval on the territorial agreement could not serve to immunize the then five year old agreement from antitrust consequences. As this Court stated in *Parker v. Brown*, 317 U.S. 341, 351

(1943), a state does not give immunity to those who violate the Sherman Act by declaring that their action is lawful. *See also Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 39 (1985) (the state may not validate anticompetitive conduct by declaring it to be lawful).

In deciding whether the first prong of *Midcal* has been satisfied, a federal court is not bound by any state court decision on the subject as it is deciding a question of federal antitrust law. *See Town of Hallie* at 44; *Racetrac Petroleum, Inc. v. Prince George's County,* 601 F. Supp 892, 907 n.16 (D. Md. 1985), *aff'd* 786 F.2d 202 (4th Cir. 1986). Rather, the state court decision must be referred to as part of a full, independent determination as to whether there is a clearly articulated and affirmatively expressed policy of the state to displace competition. There is no such policy in this instance and, thus, *Southern Motor Carriers* clearly is not dispositive as City Gas contends.

It was established in the district court that "[w]hile City Gas and Peoples do not compete with each other, they are not precluded from competing with other smaller natural gas companies within the service areas which each reserved to itself under their agreement." [Pet. App. D-12]. Neither the agreement, the FPSC's approval nor the Florida Supreme Court's ruling as to the agreement in any way purport to exclude or authorize the exclusion of any other gas company from competing within the spheres of influence selected by City Gas and Peoples Gas. The Florida Supreme Court's opinion never even mentions the words exclusive territory nor does it address any authority for natural gas companies to acquire

exclusive territories free from competition.[14] There exists no indication of legislative intent or other sovereign authority to displace competition between gas utilities and City Gas' reliance on the Florida Supreme Court's decision is thus misplaced.

Finally, City Gas attempts to bolster its contention that the FPSC always had implied authority to approve territorial agreements between natural gas utilities through the fact that, in 1989, the Florida legislature amended Chapter 366 of the Florida Statutes and established a policy whereby the FPSC is granted the express authority to approve territorial agreements between natural gas utilities. 1989 Fla. Laws, Ch. 89-292, § 2, Fla. Stat. § 366.04(3)(a) and (b). City Gas' apparent reliance on this recent statutory amendment to bolster its position in the instant case, however, is misplaced. As this Court has made clear, the views of a subsequent legislature "form a hazardous basis for inferring the intent of an earlier one." *United States v. Price,* 361 U.S. 304, 313 (1960). The fact that the Florida legislature granted the FPSC authority to approve territorial agreements between natural gas utilities in 1989 clearly does not justify any inference that this amendment merely constitutes a clarification of pre-existing authority as of 1960. To the contrary, the legislature expressly provided that "[n]othing in this act shall be construed to affect the outcome of litigation commenced prior to the effective date of this act [October 1, 1989]," 1989 Fla. Laws, Ch. 89-292, § 21, thereby clearly

---

[14] The headnotes to the decision do use the words "exclusive service agreement" but no such language appears in the Florida Supreme Court's opinion. To the extent headnotes misconstrue the holding of the court in Florida, they are to be disregarded. *Stauf v. Holden,* 94 So.2d 361, 362 (Fla. 1957) (en banc); *Knight v. State,* 217 So.2d 124, 126 (Fla.2d DCA 1968).

indicating that the authority granted is *new*. If, as City Gas contends, the FPSC always had the authority to approve territorial agreements and the need for this statutory amendment emanated from the decisions of the lower courts in this case, then the legislature certainly would have intended that this litigation be affected. The legislature, however, said just the opposite.

2. Refusal to Deal

City Gas argues that it was entitled to refuse to sell natural gas to Consolidated pursuant to a clearly articulated state policy in that Fla. Stat. § 366.03 states, in part, that "no public utility shall be required to furnish electricity or gas for resale . . ." Even though City Gas failed to clearly raise the immunity doctrine as to that conduct, the trial court, on its own, analyzed this same statute and correctly determined that it did not immunize City Gas' refusal to sell gas to Consolidated upon reasonable terms in view of its control of an essential facility without which Consolidated could not compete.

At the outset, it must be noted that the statute could not have the effect of immunizing City Gas' conduct in this case. City Gas did not refuse to sell gas to Consolidated, in reliance upon the statute. Instead, it offered to sell gas to Consolidated for resale but at a price so extortionately high that the trial court found that its price demand was tantamount to a refusal. The statute at issue clearly was never intended to permit extortionately high price demands to be immunized from actionability.

Second, as set forth in *Town of Hallie v. City of Eau Claire,* 471 U.S. at 42-44, the first prong of *Midcal* is not met unless the legislature contemplated the type of anti-competitive conduct that flows from the statute. The trial

court analyzed the history of the statute and found that the requisite foreseeability certainly is not apparent with respect to Fla. Stat. § 366.03. [Pet. App. D-81-82]. Thus, the basic premise that prompted the authorization contained in Fla. Stat. § 366.03 has no application to the refusal of a natural gas utility to sell to a competitor.

Finally, by its own terms, the statute has no application at all to City Gas' refusal to *transport* gas nor is there any policy underlying the statute arguably broad enough to cover City Gas' refusal to transport. Such repeals of the antitrust laws by implication are not favored. It simply cannot be said that there is a Florida policy articulated in any fashion that requires or even permits a natural gas utility having monopoly power to refuse to allow a competitor access to an essential facility, in clear violation of federal antitrust policies.

B. City Gas Failed to Satisfy the Active Supervision Prong of the Midcal Test

City Gas' failure to satisfy *Midcal's* first prong renders consideration of the second prong unnecessary. Nevertheless, the conclusion below that the active supervision prong of *Midcal* is not satisfied either as to the territorial agreement or as to the refusal to deal is one that clearly is consistent with the legal principles on the subject that have been articulated by this Court.

By definition, the question of "active supervision" is one of fact. Only if the agency with the power to regulate is exercising that power sufficiently to offset the otherwise harmful effects of an absence of competition can that absence be tolerated. 1 P. Areeda & D. Turner, *Antitrust Law* § 213a (1978). The state supervision requirement "serves an essentially evidentiary function: it is one way

of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. *Town of Hallie v. City of Eau Claire,* 471 U.S. at 46. Thus, "[t]he mere presence of some state involvement or monitoring does not suffice." *Patrick v. Burget,* 486 U.S. 94, 101 (1988). The factual determination below that the involvement of the FPSC in the challenged conduct falls woefully short of constituting active supervision simply is not overcome by City Gas' unsupported protestations to the contrary.

1. Territorial Agreement

Contrary to City Gas' misstatement that the territorial agreement between City Gas and Peoples would have been void absent FPSC approval, the trial court determined that the agreement was not required to be submitted to the FPSC to become effective. [Pet. App. D-67]. The court found that the FPSC considered the agreement only when someone complained and not on its own initiative. *Id.* Indeed, the FPSC has established no standards for the creation of territorial agreements and its supervision of the agreement is, at best, on a sporatic basis. *Id.*

In addition to the foregoing factual determination regarding the lack of FPSC supervision of territorial agreements, the lower courts also considered the statement of the FPSC as to its own authority that "[i]t is not clear that [it] has the statutory authority to either establish service territories for natural gas utilities (as it does for telephone, water and sewer utilities) or resolve territorial disputes between natural gas utilities (as specifically authorized for electric utilities)." [Pet. App. D-64; A-10]. Clearly, a federal court could not possibly hold that the FPSC is actively supervising service territories or territorial disputes between natural gas companies in the face of the evidence to the contrary and in light of the

FPSC's own statement that it is not clear that it has any authority to do so. Under these conditions, supervision could not be sufficiently active to totally remove all such matters from the reach of the antitrust laws. As the court below explained, based on the clear evidence in the record, "[t]his is at bottom an agreement entered into by private parties, in pursuit of their own economic interests, that is neither authorized by the state, nor closely monitored by it." [Pet. App. A-11].

2. Refusal to Deal

City Gas argues that because Fla. Stat. § 366.03 authorizes it to refuse to sell gas for resale, there is nothing left to be supervised. The evidentiary test for antitrust immunity cannot be so lightly dismissed, however. As this Court stated in *Midcal,* is not sufficient that the state merely authorize private parties to engage in the challenged conduct without further review or regulation. Rather, the policy which authorized the challenged conduct must be actively supervised by the state and the state at the very least, must monitor market conditions, review the reasonableness of the conduct, and engage in "pointed re-examination of its policy." 445 U.S. at 105. As the courts below found, there simply is no evidence that the authorization given gas utilities to refuse to sell gas for resale has ever been re-examined in light of changing market conditions so as to constitute active state supervision.

Even if Fla. Stat. § 336.03 was seen to authorize a gas utility's refusal to sell natural gas for resale, it certainly does not prohibit such sales. City Gas argues that if the utility *elects* to sell gas for resale, the terms and conditions of that sale must be approved by the FPSC, thereby demonstrating the existence of adequate

supervision. Once again, City Gas' argument is contrary to the record. It was demonstrated in the trial court that the FPSC has approved prices for the resale of natural gas between natural gas utilities of both one cent over cost and seven cents over cost and no explanation was offered for this disparity. [Pet. App. D-82]. The trial court found that the FPSC's approval of such arrangements between two natural gas utilities is virtually automatic, without any analysis of the reasonableness of the bargain struck in light of competitive conditions or competitive factors. *Id.* As the court below noted, this Court "has consistently contemplated a more vigorous, probing supervision than mere acquiescence." [Pet. App. A-11].

III

CITY GAS ABUSED ITS MONOPOLY POWER

Regardless of the source of its monopoly power or of whether that power was acquired lawfully as a consequence of regulation or unlawfully, City Gas is nevertheless strictly accountable for its abuse of that power to foreclose or eliminate competition. *See Otter Tail, supra; Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476 (E.D. Mo. 1965), *aff'd* 368 F.2d 679 (8th Cir. 1966); *Greyhound Computer Corp., Inc. v. International Business Machines Corp.*, 559 F.2d 488, 498 (9th Cir. 1977), *cert. denied* 434 U.S. 1040 (1978). Thus, even where a public utility enjoys a lawful monopoly, the court must inquire into whether the defendant *abused* its monopoly power by engaging in anticompetitive conduct. *See Continental Cablevision of Ohio, Inc. v. American Electric Power Co.*, 715 F.2d 1115, 1120-21 (6th Cir. 1983).

On the basis of *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd*

472 U.S. 585 (1985), the courts below properly held that Consolidated was not required to prove that *any* particular anticompetitive act of City Gas, viewed in isolation, itself constituted a § 2 violation. Rather, it was only incumbent upon Consolidated to prove that "City Gas has engaged in an overall pattern of anticompetitive behavior." R7-165-94. As the court explained in *Aspen Highlands*, in rejecting an argument that each of the "six things" on which the plaintiff relied to demonstrate deliberate exclusion from the relevant market must be supported by sufficient evidence for a § 2 verdict:

> We cannot agree that each one of the "six things" which plaintiff argued demonstrated abuse of monopoly power, taken alone, must be supported by sufficient evidence to find a § 2 violation. . . .
>
> [D]efendant's argument would require that we view each of the "six things" in isolation. To do this, however, would be contrary to the Supreme Court's admonition that an antitrust plaintiff "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." Plaintiff's evidence should be viewed as a whole. Each of the "six things" viewed in isolation need not be supported by sufficient evidence to amount to a § 2 violation.

738 F.2d at 1522 n.18 (citations omitted).

The Eleventh Circuit affirmed the district court's determination that City Gas abused its monopoly power, stating:

> The district court found that City Gas abused its power by the following six acts.

1. By agreeing in 1960 with Peoples Gas not to compete with each other in their respective territories in the sale of natural gas.

2. By refusing to sell or transport natural gas to Consolidated at a reasonable price.

3. By attempting to purchase Consolidated and eliminate it as a potential competitor.

4. By acquiring two other small competitors.

5. By intervening in and opposing Consolidated's FERC allocation proceedings seeking permission to sell natural gas.

6. By not charging Consolidated's customers the usual "contribution in aid of construction" to extend service to them in an effort to lure Consolidated's customers away.

The court found that the first three acts were the primary instances of anticompetitive conduct, but stated that the last three, when viewed with the principal acts, further evidenced City Gas' intent to monopolize. These are anticompetitive acts which demonstrate an intent by City Gas to exercise monopoly power. The district court properly held that City Gas was not protected from the antitrust consequences of these acts.

[Pet. App. A-12].

City Gas has failed to challenge this basis of liability on appeal. Thus, a finding of monopoly power mandates affirmance of the determination that City Gas is liable for violation of § 2 of the Sherman Act.

CONCLUSION

Although City Gas purports only to challenge the application of legal principles to the facts of this case, all that is truly challenged in the petition are the factual findings of the trial court. When the established facts are considered, it is clear that this case is fully in accord with settled antitrust principles and there exist neither conflicts requiring this Court's resolution nor questions of unsettled law requiring Court's attention. Accordingly, the petition for certiorari should be denied.

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in the Supreme Court of the United States

October Term, 1990

CITY GAS COMPANY OF FLORIDA,
Petitioner,

vs.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,
Respondent.

THE STATE OF FLORIDA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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THE STATE OF FLORIDA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

INTRODUCTION

The State of Florida files this amicus brief in support of Petitioner City Gas Company of Florida's ("City Gas") Petition for Writ of Certiorari.

INTEREST OF AMICUS STATE

By essentially overruling the Supreme Court of Florida's interpretation of a state statute, the Eleventh Circuit's decision below raises an issue of grave concern to

the State of Florida. That issue, upon which resolution of many of the other issues in this case rests, is whether a federal appellate court may ignore a state supreme court's interpretation of a state statute and conduct its own independent review of that statute's applicability. This Court on countless occasions has ruled that the meaning given a state statute by a state's highest court must be accepted by federal courts, whether or not those courts agree with the state court's interpretation. Yet, by its decision below the Eleventh Circuit has seen fit to undermine established United States Supreme Court precedents and disregard the principles of federalism upon which those precedents were founded. To allow such a contrary holding is to deny the State of Florida its sovereignty.

Accordingly, the State of Florida submits this amicus brief in support of the Petition for Writ of Certiorari filed with this Court by the Petitioner City Gas and urges this Court to accept certiorari review in this case so that the State of Florida as well as all states may be assured that the established principles of federalism remain intact.

STATEMENT OF THE CASE

For purposes of this amicus brief, the State of Florida adopts the statement of the case set forth by Petitioner City Gas at pages 2 through 6 of its Petition for Writ of Certiorari.

ISSUE (RESTATED): IN REJECTING CITY GAS' STATE ACTION DEFENSE, THE COURT OF APPEALS IN EFFECT OVERRULED A HOLDING OF THE STATE SUPREME COURT INTERPRETING A FLORIDA STATUTE AND, IN DOING SO, RULED CONTRARY TO THE ESTABLISHED PRECEDENTS OF THIS COURT.

In concluding that City Gas had violated Section 2 of the Sherman Act, 15 U.S.C. § 2, the Eleventh Circuit found, inter alia, that the 1960 territorial agreement between City Gas and Peoples Gas System was not entitled to state action immunity because of the absence of a clearly articulated state policy, thus failing to meet the first prong of the state action test set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 87 (1980).

In reaching that conclusion, the Eleventh Circuit acknowledged that the Supreme Court of Florida had validated the precise territorial agreement at issue here in a 1965 opinion wherein the Court found that the predecessor to the Public Service Commission had the implied authority under the state's public utilities regulatory act, Ch. 366, Fla. Stat., to approve territorial agreements between natural gas utilities, *City Gas Co. v. Peoples Gas Sys., Inc.*, 182 So.2d 429 (Fla. 1965). Despite the state supreme court's holding, the Court of Appeals below concluded that the decision was not controlling for purposes of the Eleventh Circuit's analysis under the federal antitrust laws. *Consolidated Gas Company of Florida, Inc. v. City Gas Co. of Fla.*, 880 F.2d 297, 303 (11th Cir. 1989). The Court then went on to conduct an independent review of Ch. 366, Fla. Stat., to determine for

itself whether the Florida Public Service Commission had the authority to approve territorial agreements between natural gas companies and, thus, whether such agreements were part of a clearly articulated state policy to displace competition.

Through its independent review, the Court of Appeals found that because Ch. 366, Fla. Stat., did not expressly convey upon the Public Service Commission the authority to approve territorial agreements between natural gas companies, the Florida legislature had not intended natural gas utilities to enjoy such exclusive territorial agreements, despite the Supreme Court of Florida's conclusion to the contrary. 880 F.2d at 302.

This holding by the Court of Appeals is plainly at odds with years of established precedent from this Court. While the Eleventh Circuit was correct in stating that the issue of "clear articulation" under Midcal was "ultimately a question of federal antitrust law," 880 F.2d at 303, it does not follow that, in applying the Midcal test to the facts before it, a Court of Appeals may blatantly ignore a state supreme court's interpretation of a state statute and then interpret the state statute to the contrary.

The deference to be given by the federal courts to a state supreme court's interpretation of a state statute is likewise a legal principle well established in federal law. This Court has ruled countless times that federal courts must not construe state statutes contrary to the

construction given them by the highest court of a state.[1] Yet, that is precisely what the Eleventh Circuit did below when it in essence overruled the holding in City Gas Co. v. Peoples Gas Sys., Inc.

The Supreme Court of Florida's exact ruling in that case as it pertained to the specific territorial agreement at issue here was that Florida Public Service Commission, then known as the Florida Public Utilities Commission, "has adequate implied authority under Ch. 366, Fla. Stat. to validate such agreements as the one before it." 182 So.2d at 436. Such a forthright statement can be reasonably construed only one way. As Petitioner City Gas states in its Petition for Writ of Certiorari, in holding as it did, the Supreme Court of Florida "put[] these words in the statute as definitely as if it had been so amended by the legislature." [City Gas Petition at 17, citing *Winters v. New York*, 333 U.S. 507, 514 (1948)]. Because the Eleventh Circuit's opinion is clearly at odds with at least a century of U.S. Supreme Court decisions as well as the numerous circuit courts of appeals opinions which, as

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[1]See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 n.9 (1978); *Hortonville Jr. School Dis. No. 1 v. Hortonville Ed.*, 426 U.S. 482, 488 (1976); *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974); *NAACP v. Button*, 371 U.S. 415, 432 (1963); *Cramp v. Bd. of Public Instruction*, 368 U.S. 278, 285 (1961); *Garner v. Louisiana*, 368 U.S. 157, 166 (1961); *Kingsley Int. Pic. Corp. v. Regents of N.Y.U.*, 360 U.S. 684, 688 (1959); *Albertson v. Millard*, 345 U.S. 242, 244 (1953); *United States v. Burnison*, 339 U.S. 87, 90 (1950); *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'ers*, 332 U.S. 495, 499-500 (1947); *Morehead v. People of New York ex rel. Tipaldo*, 298 U.S. 587, 609 (1936); *Hebert v. Louisiana*, 272 U.S. 312, 316-17 (1926); *Supreme Lodge v. Meyer*, 265 U.S. 30, 32 (1924); *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 166 (1916).

petitioner notes, have addressed this issue in the context of the state action doctrine (see note 17 of City Gas Petition at 17), the State of Florida urges this Court to grant certiorari in this case so that the State of Florida, as well as all states, may be assured that the principles of federalism and state sovereignty remain whole.

CONCLUSION

Based on the foregoing, the State of Florida submits that this Court should grant Petitioner City Gas' Petition for Writ of Certiorari.

Dated: January 15, 1991

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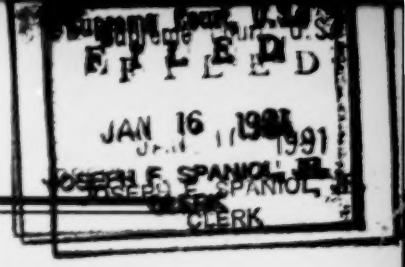
(4)

No. 90-953



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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF CITY GAS COMPANY'S PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF CITY GAS COMPANY'S PETITION FOR WRIT OF CERTIORARI

The FLORIDA PUBLIC SERVICE COMMISSION (Commission), by its undersigned attorney, pursuant to Sup. Ct. R. 37.2, moves this Court for leave to file an *amicus curiae* brief in support of City Gas Company of Florida's (City Gas) Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. As grounds therefor, the Commission states as follows:

1. The Commission is an arm of the legislative branch of government, section 350.001, Flordia Statutes (1989), and is the state agency charged with the responsibility of regulating utilities in the public interest, section 350.011, Florida Statutes

(1989). The Commission has exclusive jurisdiction to regulate natural gas companies, as well as electric utilities, water and sewer utilities and telephone companies. Chapters 364, 366 and 367, Florida Statutes (1989).

2. The regulatory authority of the Commission over natural gas utilities is extensive and multi-faceted. Pursuant to the Legislature's clear intent to replace competition with regulation in the natural gas industry, the Legislature delegated to the Commission the authority to implement that policy to the end that the people of the State of Florida are assured adequate and safe utility service at fair, just and reasonable rates.

3. This case presents significant questions regarding the applicability of the federal antitrust laws to the conduct of public utilities, where such conduct is directly regulated and controlled by the Commission.

4. In this case, the Eleventh Circuit affirmed the district court's decision imposing federal antitrust liability on a Florida public utility for entering into a territorial agreement with another public utility. That agreement was reviewed and approved by the Commission and became an order of the Commission. The order approving the agreement was subsequently reviewed and affirmed by the Florida Supreme Court as being a valid exercise of delegated legislative authority. Notwithstanding these approvals, the federal district and circuit courts held the agreement, and, therefore, the Commission order, to be a violation of antitrust law and not entitled to protection under the state-action immunity doctrine.

5. This decision puts at risk every Commission order or rule, and utility action taken pursuant thereto, which may limit competition. The decision also leaves in question the Florida Supreme Court's authority to interpret Florida law when that law is considered in federal litigation.

6. Currently, there are pending two federal antitrust actions against Florida public utilities that involve the effect of Commission rules and orders and utility action taken pursuant thereto. One case involves a Commission-approved territorial agreement between two electric utilities, alleged to be in violation of federal antitrust laws.[1] The other case involves utility action taken pursuant to Commission orders and rules in the field of cogeneration and utility purchase of cogenerated power.[2] Both cases involve instances of Commission decisions which have been reviewed and sanctioned by the Florida Supreme Court.

7. The Commission has considerable expertise in the history of Florida's regulatory policy regarding territorial agreements. The Commission participated as *Amicus Curiae* in the proceedings below before the Eleventh Circuit to explain its jurisdiction over natural gas utilities in general, and to explain its jurisdiction over territorial agreements specifically.

8. The Commission asserts that the private parties in this case are not in the position that the Commission is to inform the Court regarding the effect of this case on the State of Florida's regulation of public utilities. The Commission is in the best position to inform the Court of the public interest considerations at stake in the correct resolution of this matter.

Pursuant to Sup. Ct. R. 37.2, the Commission sought the consent of both parties to this case for the filing of an *amicus*

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[1] *Union Carbide Corp. v. Florida Power & Light Co. & Florida Power Corp.*, Civil No. 88-1622-CIV-T-13C (M.D. Fla.).

[2] *TEC Cogeneration, Inc. et al. v. Florida Power & Light Co.*, Civil No. 88-2145 CIV-ATKINS (S.D. Fla.).

curiae brief. Consolidated Gas Company of Florida, Inc. refused to consent to the Commission's filing. Therefore, the Commission respectfully requests this Court's permission to file an *amicus curiae* brief for the reasons stated above.

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IN THE

Supreme Court of the United States

October Term 1990

No. 90-953

CITY GAS COMPANY OF FLORIDA,

Petitioner,

v.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE,* FLORIDA PUBLIC SERVICE COMMISSION IN SUPPORT OF CITY GAS COMPANY'S PETITION FOR WRIT OF CERTIORARI

The Florida Public Service Commission (Commission) submits this Amicus Curiae Brief in support of Petitioner, City Gas Company of Florida's (City Gas) Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. In this brief, the Commission will specifically address Question 2(b) presented in the petition:

> 2. Whether petitioner's conduct [in entering into a territorial agreement with Peoples Gas System] is protected from antitrust liability by the state action doctrine, given that: (b) . . . the territorial agreement was submitted to and approved by the FPSC

pursuant to regulatory authority granted by a state statute and confirmed by a controlling decision of the Florida Supreme Court?

I

Interest of Amicus Curiae

The Commission, an arm of the Legislature of the State of Florida, is directed by chapters 364, 366, and 367,[1] Florida Statutes, to regulate public utilities in the state. One of the long-settled regulatory activities of the Commission concerns the establishment of service territories through Commission-approved territorial agreements between natural gas utility companies and its policy favoring such agreements.[2]

The Florida Supreme Court, which has original jurisdiction to review Commission orders relating to regulation of gas [and electric] utilities, section 366.10, Florida Statutes, (1989),[3] held that chapter 366, Florida Statutes, authorized Commission approval of such agreements generally, as well as the specific Commission order approving City Gas' agreement with Peoples Gas System (Peoples Gas). *City Gas Company v. Peoples Gas System*, 182 So.2d 429 (Fla. 1965). This extensive opinion set out in great detail not only the legal and policy basis of the Court's decision that this Commission activity was

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[1]The "very extensive authority" of the Commission over regulated utilities in the State of Florida and the public interest served thereby are described in *City Gas Co. v. Peoples Gas System*, 182 So.2d 429, 434-7 (1965), cited extensively, *infra*.

[2]Commission Order No. 3051 (1960). See Appendix.

[3]Section 366.10, Florida Statutes, states: As authorized by § 3(b)(2), Art. V of the State Constitution, the Supreme Court shall review, upon petition, any action of the Commission relating to rates or *service* of utilities providing electric or *gas service*. (emphasis supplied.)

authorized, but also the role of territorial agreements in Florida's regulation of public utilities.

Despite this holding of Florida's highest court, the District Court found, and the Eleventh Circuit affirmed and reaffirmed *en banc*, that federal antitrust liability resulted from City Gas' act of

> agreeing in 1960 with Peoples Gas not to compete with each other in their respective territories in the sale of natural gas.

Consolidated Gas Co. of Florida v. City Gas Co., 880 F.2d 297, 304 (11th Cir. 1989).

In so holding, the courts below have misapplied the state action doctrine formulated by this Court in *Parker v. Brown*, 317 U.S. 343 (1942), and impaired the principles of federalism and comity underlying that decision. As a result, the regulatory authority of the Commission has been directly infringed. Private parties must now choose whether to comply with the Commission's orders, as approved by the state's highest court, or the conflicting decision of the federal court of appeals.

The failure of the courts below to accede to the statutory interpretation of the Florida Supreme Court in their state action analysis, as required by *Cotton States Mutual Insurance Co. v. Anderson*, 749 F.2d 663 (11th Cir. 1984), has placed the state action immunity of all Commission regulation in doubt. This error requires review by this Court because the Commission cannot assume that the holdings of Florida's highest court will be treated as authoritative,[4] and the Commission therefore supports City Gas' Petition For Certiorari.

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[4]This is of particular concern to the Commission because the Florida Supreme Court is the primary reviewing court interpreting the regulatory statutes under which the Commission is authorized to act. n. 3, *supra*.

Moreover, the Commission urges, in the alternative, that this holding be reviewed even if other questions presented in the petition are not reviewed.[5]

II

Summary of Argument

The City Gas/Peoples Gas Territorial Agreement Is Immune From Antitrust Liability Under the State Action Doctrine

In their partial dissent to the Eleventh Circuit's *en banc* affirmance, Judges Johnson and Kravitch analyzed the state action immunity of the City Gas/Peoples Gas territorial agreement. The Commission concurs in and adopts that analysis, which appears at 912 F.2d 1262, and, would further state:

A. The Eleventh Circuit Improperly Applied *Midcal's* First Prong, "Clear Articulation"

The Commission reviewed and approved the territorial agreement at issue. Moreover, the Florida Supreme Court held that the Commission's approval of the gas utility territorial agreement specifically, and such agreements generally, was valid and authorized by the legislative grant of regulatory

[5]It is noted in this connection that the ten judges of the Eleventh Circuit *en banc* were split five to five on the territorial agreement issue and that of the five judges who held the territorial agreement to be immune under the state action doctrine from antitrust liability, three held for City Gas and two held for appellee, Consolidated Gas, on the remaining issues. *Consolidated Gas Co. of Fla., Inc., v. City Gas Co. of Fla.*, 912 F.2d 1262, 1338, (11th Cir. 1990) (*en banc*). Clearly, the territorial agreement holding below can and should be reviewed regardless of how this Court disposes of the other issues in this case.

authority to the Commission. *City Gas v. Peoples Gas System*, 182 So.2d 429 (Fla. 1965).

To determine whether the state action doctrine of *Parker v. Brown* was applicable to the territorial agreement to immunize it from federal antitrust liability, the Eleventh Circuit applied the two-pronged test of *California Retail Liquor Dealer's Association v. Midcal Aluminum, Inc.*, 445 U.S. 87, 105 (1980) (*Midcal*). The Eleventh Circuit acknowledged that it was appropriate to look to the relevant statutory construction of the state's highest court in applying the first prong of *Midcal*; i.e., whether private conduct is immune pursuant to a clearly articulated state policy.

Instead of then relying on the Florida Supreme Court's holding that Commission-approved gas utility territorial agreements were valid and authorized by the Legislature and were, therefore, the clearly articulated policy of the state as sovereign, the Eleventh Circuit ignored the state's highest court and found that there was no clearly articulated policy.

Citing *dicta* in a Commission order concerning questions or doubts about the Commission's legal authority, the Eleventh Circuit ignored the fact that the Florida Supreme Court has never receded from its opinion in *City Gas v. Peoples Gas* and that the *Midcal* clear articulation test was therefore met under this Court's opinion in *Southern Motor Carriers Rate Conference, Inc, v. United States*, 471 U.S. 48, 64 (1985).

B. The Eleventh Circuit Misapplied *Midcal's* Second Prong, "Active Supervision"

Though the state officials of the Commission reviewed the territorial agreement and the Florida Supreme Court affirmed the authority of the Commission to do so, as well as the invalidity of such agreements when not approved by the Com-

mission, the Eleventh Circuit ignored the fact that this met *verbatim* the formulation of the active supervision test cited by the Eleventh Circuit itself. *Patrick v. Burget*, 456 U.S. 94 (1988).

Instead, the Eleventh Circuit's active supervision analysis was tainted by the same error noted previously. Citing *dicta* about questions or doubts appearing in a *Commission* order, the Eleventh Circuit speculated that the Commission might not feel confident about its ability to disapprove such territorial agreements.

In so finding, the Eleventh Circuit again ignored various holdings of the Florida Supreme Court which stated, as a matter of law, that the Commission had the authority to approve or disapprove such agreements and that such agreements were invalid in the absence of Commission approval. The *dicta* supplied no valid reason for the Eleventh Circuit to find that the territorial agreement was not actively supervised by the Commission when in fact it was. The Eleventh Circuit's disregard of the Florida Supreme Court's statutory construction in *City Gas v. Peoples Gas* and other relevant cases impairs the principles of federalism and comity at the heart of the state action doctrine and facially conflicts with the First Circuit's opinion in *New England Motor Rate Bureau, Inc. v. Federal Trade Commission*, 908 F.2d 1064 (1st Cir. 1990).

III

Argument

The City Gas/Peoples Gas Territorial Agreement Is Immune From Antitrust Liability Under the State Action Doctrine

As relevant to this brief, the Eleventh Circuit affirmed with an opinion, *Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 880 F.2d 297 (11th Cir. 1989), the District Court's finding that the City Gas/People Gas territorial agreement was not immune from antitrust liability under the state action doctrine. This holding was re-affirmed *per curiam* by the Eleventh Circuit *en banc*. It was also addressed, however, by Judges Johnson and Kravitch in their partial dissent, 912 F.2d at 1262, and the Commission concurs in and adopts their analysis of that specific issue. In addition, the Commission would state as follows:

A. The Eleventh Circuit Improperly Applied *Midcal's* First Prong, "Clear Articulation"

In *Parker v. Brown, supra*, this Court held that the Sherman Act was not intended to reach the anticompetitive activity contemplated in state regulation. *California Retail Liquor Dealers' Association v. Midcal Aluminum, Inc.*, 445 U.S. 87, 105 (1980), (*Midcal*), established a two-pronged test for private party anticompetitive conduct to warrant *Parker* immunity: the conduct had to be pursuant to a clearly articulated policy of the state to displace competition with regulation and the conduct had to be closely supervised by the state. *Southern Motor Carriers*, in turn, established that

> a private party need not "point to specific, detailed legislative authorization" for its challenged conduct.

> As long as the state as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied.

Southern Motor Carriers v. United States, 471 U.S. 48, 64 (1985).

Applying the foregoing authority, the territorial agreement met the first prong of the *Midcal* test for state action immunity. Section 366.03, Florida Statutes, gives the Commission jurisdiction to:

> ***regulate*** and ***supervise*** each public utility with respect to its ***rates*** and ***service***. (emphasis supplied)

The Commission, in its order approving the territorial agreement, explicitly relied on this clearly articulated policy of the Legislature to displace competition with regulation:

> It is our opinion that territorial agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities which invariably accompany expansions into areas already served by competing utilities are definitely in the public interest and should be encouraged and approved ***by an agency such as this, which is charged with the duty of regulating public utilities*** in the public interest. (emphasis supplied).

Commission Order No. 3051. See Appendix.

The Florida Supreme Court ultimately addressed the question of whether the Commission's approval of the City Gas/Peoples Gas territorial agreement was authorized by the Legislature's grant of regulatory authority. The Court answered in the affirmative, based on an extensive and detailed statutory construction of chapter 366, Florida Statutes:

> We also conclude that *the Commission has* adequate implied *authority under Chapter 366 to validate such agreements* as the one before us. (emphasis supplied) *City Gas Company v. Peoples Gas System, Inc.*, 182 So.2d 429, 436 (1965)

That should have been found by the courts below to satisfy the first prong of *Midcal*. As stated in *Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663, 667,

> [s]tate courts have a *right* to construe their own statutes, and *federal courts are bound* by that state interpretation. [citation omitted]. (emphasis supplied)

Indeed, the Eleventh Circuit at least partially corrected the District Court's error in disregarding the Florida Supreme Court's opinion:

> When examining whether private conduct is immune pursuant to a clearly articulated policy, *it is proper to look to state supreme court construction of the relevant statutes*. [citations omitted] (emphasis supplied)

880 F.2d at 302-3.

Unfortunately, the Eleventh Circuit then found that, as a matter of "federal antitrust law," the first prong of *Midcal* was not met because of :

> 1. The Commission's own expression of doubt as recently as 1985 as to its authority to establish exclusive territories or to resolve territorial disputes between natural gas utilities.
>
> 2. . . . [City Gas' contention] to the Commission that the agreement was invalid under federal antitrust law and the Commission should not force City Gas to adhere to it.

> 3. . . . the clear statutory grant of authority of exclusive territories for other [non-gas] entities, the absence of authority for territorial agreements for natural gas utilities [*but, see,* 182 So. 2d at 436], and the uncertainty with which the Commission has approached these agreements. . . .

880 F.2d at 303.

None of these reasons (which are the only reasons given by the Eleventh Circuit for its failure to find that the state's policy was "clearly articulated") are apposite to the *Midcal* test, which tests whether the *state's policy* is clearly articulated, *not whether doubts or questions were ever raised about the Commission's legal authority* in *dicta*. *Midcal, supra*, 445 U.S. 87, 105 (1980).

The state's *policy* of replacing competition between natural gas utilities with regulation in the form of Commission-approved territorial agreements was established in 1960 and affirmed as the *authorized policy of the State as sovereign* by the Florida Supreme Court in 1965. *City Gas v. Peoples Gas*, 182 So.2d at 436.

Nothing cited by the Eleventh Circuit or the district court indicates that the Commission or the Florida Supreme Court had altered *that clearly articulated policy* ONE IOTA. The *dicta* cited as the Commission's "doubts" in 1985 referred to concern about the Commission's *legal position* as the material quoted in the District Court opinion demonstrates. *See*, 665 F.Supp. at 1530.

At bottom, no such expression of concern in *dicta* could legally affect the *Midcal* "clear articulation" test unless and until the Florida Supreme Court could be persuaded to recede from its opinion in *City Gas v. Peoples Gas. That has never happened.* Moreover, the Florida Supreme Court explicitly re-

jected the argument that it should so recede. *Peoples Gas System v. Mason*, 187 So.2d 335, 339-40 (1966).

For the same reasons, the contentions of City Gas to the Commission cited by the Eleventh Circuit are even less relevant to the analysis of the first prong of *Midcal*. City Gas was never able to persuade the Florida Supreme Court to alter ONE IOTA its holding that the Florida Legislature had authorized the Commission to replace competition with regulation by approving territorial agreements between natural gas utilities. At most, the suggestions resulted in the cited *dicta*, which had no legal effect even in the Commission proceeding concerned, and should have had none in this case, *a fortiori*.

Moreover, the claimed circumstance that certain non-gas utilities had express statutory authorization for Commission approval of territorial agreements provides no justification to ignore the Florida Supreme Court's holding in *City Gas v. Peoples Gas, supra*, for the purpose of determining state action immunity.[6] *Southern Motor Carriers, supra, negated* the

[6]Both lower courts reasoned that Florida statutes explicitly authorized electric utility territorial agreements and that, therefore, the regulatory scheme for electric utilities differed from that for gas utilities. This analysis was incorrect. During the relevant time period, Commission approval of territorial agreements for both investor-owned natural gas *and* electric utilities was based on implied authority affirmed (in numerous cases) by the Florida Supreme Court.

A statute was passed in 1974 (See Appendix) explicitly extending Commission authority to include approval of territorial agreements involving *municipal* and *cooperative* electric utilities because Commission authority over municipals and cooperatives was more limited and, therefore, a specific statute was needed. In contrast, "The powers of the Commission over . . . *privately-owned* utilities is *omnipotent* within the confines of the statute and the limits of organic law." (emphasis supplied) *Storey v. Mayo*, 217 So.2d 304, 307 (Fla. 1968), *cert. den.* 395 U.S. 909, 895 S. Ct. 1751, 23 L.Ed.2d 222 (1969).

Therefore, no dissimilarity between gas and electric utility regulation in Florida exists to justify a denial of state action immunity for the territorial agreement between City Gas and Peoples Gas.

requirement of express statutory authorization *as a matter of federal antitrust law*.[7]

Finally, there has been *no* Commission or Florida Supreme Court "uncertainty" as to the state *policy* to replace competition with regulation by means of Commission-approved gas utility territorial agreements, a policy which could hardly have been more clearly articulated. Commission Order No. 3051 as affirmed, *City Gas v. Peoples Gas*, 182 So.2d 429. This Court should not confuse *dicta* in a Commission order with the *state policy* which is relevant to the *Midcal* tests. State action immunity should not come and go depending upon the confidence or doubt expressed about legal authority in *dicta*, but, as a matter of law, be based on the interpretation by the highest state court of the relevant statutes governing the state agency and its officials. *Consolidated Television Cable Service, Inc. v. City of Frankfort, Ky.*, 857 F.2d 354 (6th Cir. 1988).

B. The Eleventh Circuit Improperly Applied *Midcal's* Second Prong, "Active Supervision"

Citing *Patrick v. Burget*, 456 U.S. 94 (1988), the Eleventh Circuit noted that

> Active supervision requires that *state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy*. (emphasis supplied.)

In its order reviewing and approving the City Gas/Peoples Gas territorial agreement, the Commission stated that the agreement

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[7]As stated therein, "a private party acting pursuant to an anticompetitive regulatory program need not 'point to specific, detailed legislative authorization'" to meet *Midcal's* first prong. 471 U.S. at 64.

> can have no validity without the approval of this Commission.

Commission Order No. 3051.

Obviously, the active supervision test of *Midcal*, as restated in *Patrick*, is met. The Commission (*state officials*, as contrasted with doctor-competitors in *Patrick*) *reviewed* the territorial agreement and *disapproved as invalid ab initio* any such agreements not receiving Commission approval.

Once again, however, the Eleventh Circuit's analysis is tainted by the *same error* apparent previously. Accordingly, the Eleventh Circuit held:

> That the Commission has *expressed doubt* about its authority to either establish exclusive agreements or to resolve disputes between natural gas utilities, unlike its express authority to do so for electric utilities [but, *see*, n. 5, *supra*], does not demonstrate to the Court that the Commission *felt confident* it could "disapprove [agreements] that fail to accord with state policy." (emphasis supplied)[8]

Like the "clear articulation" first prong of *Midcal*, the "active supervision" second prong of *Midcal* relates to what the Commission *did and had the actual legal authority to do*, not to whether doubts were expressed in *dicta* about that authority. Unless the Commission was able to persuade the Florida Supreme Court to recede from its decision in *City Gas v. Peoples Gas*, which it did not, the cited doubts *had no legal effect*. Moreover, the doubts expressed in 1985 certainly did

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[8]Here, the Eleventh Circuit again ignored the Florida Supreme Court's affirmance of Commission Order No. 3051, which stated that such agreements "can have no validity without the approval of this Commission." *See* also, *Peoples Gas System v. Mason*, 187 So.2d 335, 339-40 (1966).

not change the fact that City Gas' and Peoples Gas' "particular anticompetitive act" of entering into a territorial agreement was reviewed by the *state officials* of the Commission, thus meeting the requirement of close supervision as stated in *Patrick, verbatim.*

Again, citation by the Eleventh Circuit of the express authority for electric utilities as relevant to its finding that *Midcal's* second prong was not met is incorrect as a matter of state law, *City Gas v. Peoples Gas,*[9] and federal antitrust law, *Southern Motor Carriers.*[10] Nor do any federal antitrust cases require that the state create "standards" for territorial agreements beyond that cited by the Commission; i.e., that *the public interest was better served by replacing competition with regulation in* the form of gas-utility territorial agreements so as to avoid the unnecessary and costly duplication of facilities that results from competition between natural monopolies:

> Duplication of public utility facilities is an economic waste and results in higher rates which the public must pay for essential services. Reasonable and realistic *regulation* in such cases, is better than, and *takes the place of competition.* (emphasis supplied)

Commission Order No. 3051.

As recently stated by the United States Court of Appeals, First Circuit, in *New England Motor Rate Bureau, Inc. v. Federal Trade Commission,* 908 F.2d 1064 (1st Cir. 1990),

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[9]As stated by the Florida Supreme Court, ". . . *we reject* the notion of *any such distinction between express and implied statutory authority* as posited by the chancellor. The powers of this and similar agencies include both those expressly given and those given by clear and necessary implication from the provisions of the statute [citation omitted]. *Neither category is possessed of greater dignity or effect.*" 182 So.2d at 436-7. (emphasis supplied)

[10]n. 7, *supra.*

> Where the state's program is in place, is staffed and funded, grants to state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state courts, and demonstrates some basic level of activity directed toward seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established [as to the "active supervision" prong of *Midcal, Patrick*]. Otherwise, the state action doctrine would be turned on its head. Instead of being a doctrine of preemption, allowing for the state's own action, it would become a means for federal oversight of state officials and their programs.

The Eleventh Circuit opinion clearly conflicts with this First Circuit analysis. By its attempted federal oversight of every expression of concern by state officials about their legal authority, the Eleventh Circuit has indeed turned the state action doctrine on its head. There is no authority for the Eleventh Circuit's holding that state action immunity is lost because of the cited *dicta*.[11] Florida's regulatory program providing for Commission-approved gas utility territorial agreements has been clearly articulated and closely supervised for thirty years. Commission Order No. 3051; *City Gas v. Peoples Gas, supra; Cotton States, supra*. For *Midcal* purposes, the question is *not* whether questions or doubts were ever raised about the Commission's legal authority during that time, but whether, *as a matter of law*, the *state policy* to replace competition with regulation was clearly articulated and activity engaged in pur-

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[11] There is irony, however, in that whatever questions might have concerned these officials because their authority was implied rather than express should not have included loss of state action immunity. *Southern Motor Carriers*, n. 7, *supra*.

suant to it was actively supervised. *As a matter of law*, the relevant cases and orders answered that question in the affirmative. This Court should correct the courts below, which ignored those cases and orders in favor of irrelevant *dicta*.

CONCLUSION

In denying state action immunity for the City Gas/Peoples Gas territorial agreement, the Eleventh Circuit failed to adhere to the principles of comity and federalism which have long guided this Court's state action jurisprudence.

Both the correct resolution of that issue and the continued viability of Florida's regulation of public utilities require that certiorari be granted to review and reverse that holding of the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A

BEFORE THE FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION

DOCKET NO. 6231-GU

ORDER NO. 3051

In re: Territorial Agreement between Peoples Gas System, Inc. and City Gas Company of Florida.

ORDER APPROVING AGREEMENT

BY THE COMMISSION:

Peoples Gas System, Inc. and City Gas Company of Florida are gas public utilities operating under the jurisdiction of the Florida Railroad and Public Utilities Commission pursuant to Chapter 366, Florida Statutes. Said utilities have filed with this Commission a copy of a Territorial Agreement entered into between them on September 9, 1960. The Territorial Agreement is an agreement between said companies as to the territorial service area boundary between said two companies in Dade and Broward Counties, Florida. Its approval is requested by the Commission.

Chapter 366, Florida Statutes, does not authorize the Commission to grant franchises or certificates of public convenience and necessity to electric and gas public utilities. The Commission's jurisdiction under said chapter extends to the rates, service, and the issuance and sale of certain securities of public utilities as defined therein. In the exercise of this jurisdiction, the Commission is specifically authorized to require repairs, improvements, additions and extensions to the plant and equipment of any public utility reasonably necessary to promote the

convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto. Obviously, any agreement between two gas utilities which has for its purpose the establishing of service areas between the utilities will, in effect, limit to some extent the Commission's power to require additions and extenions to plant and equipment reasonably necessary to secure adequate service to those reasonably entitled thereto. In our opinion, such a limitation can have no validity without the approval of this Commission.

It is our opinion that territorial agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities which invariably accompany expansions into areas already served by a competing utility, are definitely in the public interest and should be encouraged and approved by an agency such as this, which is charged with the duty of regulating public utilities in the public interest. Duplication of public utility facilities is an economic waste and results in higher rates which the public must pay for essential services. Reasonable and realistic regulation, in such cases, is better than, and takes the place of competition. A public utility is entitled under the law to earn a reasonable return on its investment. If two similar utilities enter the same territory and compete for the limited business of the area, each will have fewer customers, but there inevitably will be excess facilities which must earn a reasonable return. The rates in such a situation will be higher than the service is worth, or customers in more remote areas will bear some of the unjustified expense necessary to support such economic waste. In the absence of a specific statute limiting the service areas of various public utilities, territorial agreements such as we are concerned with here, constitute no unreasonable restriction on the Commission's powers, but actually assist the Commission in the performance of its primary function of procuring for the public essential utility services at reasonable costs.

Based upon our study of the Territorial Agreement under consideration and the circumstances surrounding the execution of said agreement, it is our opinion that said agreement is in the public interest and should be approved by this Commission.

NOW, THEREFORE, IN CONSIDERATION THEREROF, it is

ORDERED by the Florida Railroad and Public Utilities Commission that the Territorial Agreement between Peoples Gas System, Inc. and City Gas Company of Florida as of September 9, 1960, be and the same is hereby approved.

By Order of Chairman Jerry W. Carter, Commissioner Wilbur C. King, and Commissioner Edwin L. Mason, as and constituting the Florida Railroad and Public Utilities Commission, this 9th day of November, 1960.

/s/ [Illegible]

EXECUTIVE SECRETARY

(SEAL)
GPM

APPENDIX B

CHAPTER 74-196

Committee Substitute for House Bill No. 1543

AN ACT relating to the Florida public service commission; adding subsections (2) and (3) to §366.04, Florida Statutes, extending commission jurisdiction over rural electric cooperative and municipal electric utilities for certain purposes; authorizing the commission to plan and develop a coordinated electric power grid; adding subsections (7) and (8) to §366.05, Florida Statutes, authorizing the commission to require certain reports and to require necessary facilities for the reliability of the energy grid; creating §366.05, Florida Statutes, providing for availability of energy reserves; creating §366.01, Florida Statutes, providing for a study of rate structure by the legislature; providing an appropriation; amending §366.11, Florida Statutes, providing limitations on certain exemptions; creating §366.015, Florida Statutes, directing the Florida public service commission to assume primary responsibility for initiation of interagency liaison in all technical areas affecting utilities under its primary jurisdiction; providing an effective date:

Be It Enacted by the Legislature in the State of Florida:

Section 1. Section 366.04, Florida Statutes, is amended by adding subsections (2) and (3) to read;

366.04 Florida public service commission; jurisdiction:

(2) In the exercise of its jurisdiction the commission shall have power over rural electric cooperative and municipal electric utilities for the following purposes:

(a) To prescribe uniform systems and classifications of accounts.

(b) To prescribe a rate structure for all electric utilities.

(c) To require electric power conservation and reliability within a coordinated grid for operational as well as emergency purposes.

(d) To approve territorial agreements between and among rural electric coopeatives, municipal electric utilities, and other electric utilities under its jurisdiction or any of them; provided, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements.

(e) To resolve any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction or any of them. In resolving territorial disputes the public service commission may consider, but not be limited to the ability of the utilities to expand services within their own capabilities, the nature of the area involved including population and the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services. No provision of this chapter shall be construed or applied to impede, prevent or prohibit any municipally owned electric utility system from distributing at retail electrical energy within its corporate limits, as such corporate limits exist on the effective date of this act, provided, however, existing territorial agreements shall not be altered or abridged hereby.

(3) The commission shall further have jurisdiction over the planning, development and maintenance of a coordinated electric power grid throughout Florida, to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

Section 2, Section 366.05, Florida Statutes, is amended by adding new subsections (7) and (8) to read:

366.05 Powers:

(7) The commission shall have the power to require reports from all electric utilities to assure the development of adequate and reliable energy grids.

(8) If the commission determines that there is probable cause to believe that inadequacies exist with respect to the energy grids developed by the electric utility industry, it shall have the power, after holding hearings as provided by law, and after a finding that mutual benefits will accrue to the public utilities involved, to require installation or repair of necessary facilities, including generating plants and transmission facilities with the costs to be distributed in proportion to the benefits received, and to take all necessary steps to insure compliance. The electric utilities involved in any action taken or orders issued pursuant to this subsection shall have full power and authority notwithstanding any general or special laws to the contrary, to jointly plan, finance, build, operate or lease generating and transmission facilities and shall be further authorized to exercise the powers granted to corporations in chapter 361, Florida Statutes. Provided that this subsection shall not supersede or control any provision of the electric power plant siting act, sections 403.501 thru 408.516, Florida Statutes, 1973.

Section 3. Section 366.055, F.S., is created to read:

366.055 Availability of and payment for energy reserves. —

(1) Energy reserves of all utilities in the Florida energy grid shall be available at all times to insure that grid reliability and integrity are maintained. The commission is hereby authorized to take such action as necessary to assure compliance; provided, however, prior commitments as to energy use in interstate commerce as approved by the Federal Power Commission; commitments between one electric utility and another which have been approved by the Federal Power Commis-

sion; or commitments between an electric utility which is a part of the energy grid created herein and another energy grid shall not be abridged or altered except during an energy emergency as declared by the governor and cabinet.

(2) When the energy produced by one electric utility is transferred to another or others through the energy grid and under the powers granted by this section, the commission shall direct the appropriate recipient utility or utilities to reimburse the producing utility in accordance with the latest wholesale electric rates approved for the producing utility by the Federal Power Commission for such purposes.

Any utility which provides a portion of those transmission facilities involved in the transfer of energy from a producing utility to a recipient utility or utilities shall be entitled to receive an appropriate reimbursement commensurate with the transmission facilities and services provided. Provided further, no utility shall be required to sell purchased power to a recipient utility or utilities at a rate lower than the rate at which the power is purchased from a producing utility.

(3) To assure efficient and reliable operation of a state energy grid, the commission shall have the power to require any electric utility to transmit electric energy over its transmission lines from one utility to another or as a part of the total energy supply of the entire grid, subject to the provisions hereof.

Section 4, Section 366.061,Florida Statutes, is created to read:

366.061 Electric utility rate structure study. —

(1) The legislature finds that over the past twelve (12) years electric power demand has been growing at an annual rate of approximately eleven (11) percent and that the impact of this growth rate on required electrical rate needs adequate investigation.

(2)(a) There is created a joint select committee of the senate and house of representatives composed of five (5) members of the senate appointed by the president of the senate and five (5) members of the house of representatives appointed by the speaker of the house of representatives. The committee shall conduct or contract with consultants of national reputation to conduct a study of rate structure of all electric utilities in Florida including rural electric cooperative and municipal electric utilities. A final report shall be submitted to the public service commission and the legislature by March 15, 1975. The members of the committee shall serve until the end of the 1975 regular session of the legislative at which time the committee shall terminate.

(b) Among the factors to be examined by the study are the form of marginal costs of service to new customers, the ability technically and economically, to engage in peak load pricing and the magnitude and details of the economic relationships in Florida between the demand for electricity and its price, as well as other factors which may affect decisions on alternative rate structures.

(3) There shall be appropriated from the general revenue fund the sum of fifty thousand ($50,000) with which to conduct its study during the fiscal year 1974-75.

Section 5. Section 366.11, Florida Statutes, is amended to read as follows:

366.11 Certain exemptions: No provision of this chapter shall apply in any manner *other than as specified in section 366.04(2) and (3), section 366.05(7) and (8), section 366.055, and section 366.001, Florida Statutes,* to utilities owned and operated by municipalities whether within or without any municipality, or by cooperatives organized and existing under the rural electrification cooperative law of the state, nor to the sale of electricity, manufactured gas or natural gas at wholesale by any

public utility to, and the purchase by, any municipality or cooperative under and pursuant to any contracts now in effect or which may be entered into in the future, where such municipality or cooperative is engaged in the sale and distribution of electricity, manufactured or natural gas, nor to the rates provided for in such contracts. ***Further the provisions of section 350.78, Florida Statutes, shall not apply to municipally owned and operated electric utilities and rural electric cooperatives.*** Nothing herein shall restrict the police power of municipalities over their streets, highways and public places or the power to maintain or require the maintenance thereof, nor the right of a municipality to levy taxes on public services under §167.431, Florida Statutes, nor affect the right of any municipality to continue to receive revenue from any public utility as is now provided or as may be hereafter provided in any franchise, nor repeal §167.22, Florida Statutes.

Section 6. Section 366.015, Florida Statutes, is created to read:

366.015 Interagency liaison. — The Florida public service commission is directed to provide for and assume primary responsibility for establishing and maintaining continuous liaison with all other appropriate state and federal agencies whose policy decisions and rule-making authority affect those utilities which the commission has primary regulatory jurisdiction. This liaison shall be conducted at the policy-making levels as well as department, division or bureau levels. Active participation in other agency public hearings is encouraged to transmit the commission's policy positions and information requirements in order to provide for more efficient regulation.

Section 7. This act shall take effect July 1, 1974.

Approved by the Governor June 17, 1974.

Filed in Office Secretary of State June 81, 1974.

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No. 90-953

IN THE

Supreme Court of the United States

October Term 1990

CITY GAS COMPANY OF FLORIDA,
Petitioner,

v.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* WITH BRIEF *AMICUS CURIAE* SUPPORTING PETITION FOR CERTIORARI

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IN THE
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MOTION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE SUPPORTING PETITION FOR CERTIORARI

The National Association of Regulatory Utility Commissioners (NARUC) hereby respectfully moves for leave to file the accompanying brief as amicus curiae. The written consent of the Petitioner has been obtained and filed with the Clerk of the Court. The Respondent has not consented.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States engaged in the economic and safety regulation of carriers and utilities. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating the retail rates and services of electric, gas and telephone utilities operating within their respective jurisdictions. These officials have the obligation under State law to assure the establishment and maintenance of such services within respective franchised utility service territories as may be required by the public convenience and necessity, and to ensure that such services are provided at rates and conditions which

are just, reasonable, and nondiscriminatory for all consumers.

In this case, this Court has been asked to review the relationship of Federal antitrust law and traditional and pervasive State regulatory programs through which public utilities and common carriers provide their essential services to the public. In the decision for which Petitioner seeks the Court's review, the U.S. Court of Appeals for the Eleventh Circuit held, inter alia, that one of the fundamental aspects of State utility regulation -- the requirement that utilities operate in exclusive franchise territories -- can be properly enjoined under the provisions of Section 2 of the Sherman Act. As such, the decision strikes at the heart of the State regulatory programs administered by the members of the NARUC which are based on the long-established and settled principle that duplication of utility facilities in a given

geographic market will result in inefficient and less affordable service to the consuming public. In the language of this Court's formulation of the State action defense to Federal antitrust liability, the creation and maintenance of franchised utility service territories has been and continues to be "affirmatively expressed" and "actively supervised" regulatory policy in virtually every State in the Nation.

If broadly applied, the Court of Appeals' decision will have serious consequences for the regulatory policies and procedures of each of the NARUC's member commissions. Therefore, we believe that the amicus participation of a national organization such as the NARUC, which represents each of these State agencies, is justified. The NARUC respectfully requests that the accompanying brief be accepted for filing.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE SUPPORTING PETITION FOR CERTIORARI

INTEREST OF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) submits this brief as amicus curiae in support of the petition for writ of certiorari due to the substantial harm the decision below will have upon the regulation of public utilities

by its member State regulatory commissions.

As described in the preceding motion, the NARUC is the national organization which represents the collective interest of the State regulatory utility commissions exercising jurisdiction over natural gas, electric and telephone utilities operating within their respective borders. The NARUC's member commissions, generally called "public service commissions" or "public utility commissions" (PSCs or PUCs), include the Florida Public Service Commission (FPSC), which also seeks amicus status in this case in support of the petition for writ of certiorari.

In the decision for which Petitioner City Gas Company of Florida (City Gas) seeks this Court's review, the United States Court of Appeals for the Eleventh Circuit affirmed a decision of the United States District Court for the Southern District of Florida which held, inter alia, that City Gas, a

natural gas distribution company regulated by the FPSC, violated section 2 of the Sherman Act, 15 U.S.C. sec. 2 (1990) by acquiring and maintaining an exclusive service territory with the approval of the FPSC as affirmed by the Supreme Court of Florida.[1] By its decision, the Court of Appeals accepted the District Court's ruling that City Gas' 1960 territorial agreement with another gas distributor, Peoples Gas System, Inc., was not exempt from antitrust liability under the "State action" doctrine established by this Court in its decision in Parker v. Brown, 317 U.S. 341 (1943) and its progeny. Specifically, the Court below held

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[1] The panel opinion of the Court of Appeals (Petitioner's Appendix A) is reported at 880 F.2d 297 (11th Cir. 1989). The per curiam opinion and dissents of that Court en banc (Petitioner's Appendix B) are reported at 912 F.2d 1262 (11th Cir. 1990). The opinion of the District Court (Petitioner's Appendix D) is reported at 665 F. Supp. 1493 (S.D. Fla. 1987). Subsequent reference will be made to these decisions, as they appear in Petitioner's Appendix, in this form: App. at ____.

that the State action defense was unavailable because the territorial agreement did not constitute "a clearly articulated and affirmatively expressed" regulatory policy of the State of Florida, and was not "actively supervised" by the FPSC. In Question 2 of its Petition for a Writ of Certiorari, City Gas has asked this Court to review these issues.

The Court of Appeals' reasoning makes this case important to State regulators for the following reasons: first, by holding that the FPSC's approval of the territorial agreement, as affirmed by the State's Supreme Court, was insufficient evidence of the State's regulatory policy (App. at A-10), the Court of Appeals has greatly restricted the regulatory flexibility of the State commission; second, by holding that the FPSC insufficiently supervised the agreement because the Commission only "looked at this agreement" some time in the

past (App. at A-11), the Court of Appeals has sanctioned intrusive Federal oversight and review of State regulatory practices and procedures. In both cases, the Court has gone far beyond the State action tests this Court has applied in the past to other State regulatory policies and practices.

Accordingly, this case raises important issues, which should be addressed by this Court, concerning the manner in which State commissions, legislatures and courts establish and supervise their policies for the economic regulation of utilities and common carriers. As the National representative of the State commissions, the NARUC's interest in addressing these State action issues is strong, compelling its participation in this case.[2]

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[2] Consistent with this Court's Rule 37.1, the NARUC will not repeat the discussion and analysis of the State action doctrine contained in the Petition for Writ of Certiorari and the amicus brief of the FPSC. The NARUC supports those arguments.

SUMMARY OF ARGUMENT

By its decision, the Court of Appeals has sanctioned the use of Federal antitrust law to scrutinize and reject a regulatory practice basic to utility regulation in virtually every State: the establishment of exclusive franchised service territories in which utilities are legally obligated to provide service to all consumers located within the territory. By faulting the manner in which the State of Florida has established and implemented its service territory policy, the Court below has called into question similar practices across the country. Accordingly, this case raises issues of broad National scope and import which should be reviewed by this Court.

In addition, the Court of Appeals has misconstrued this Court's decisions in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 87 (1980) and Southern Motor Carriers Rate Conference

v. United States, 471 U.S. 48 (1985) to assess State policymaking and regulatory practices and procedures far beyond any intrusion this Court, or other Courts of Appeals, have sanctioned. And the issue reaches beyond the question of franchised service territories. Under the Court of Appeals' reasoning, any policy or practice established by a State regulatory commission under general statutory authority, such as the common directive to ensure "just and reasonable" rates, will be at risk, even if the decision of the State commission has been affirmed by the State's highest court as consistent with the intent of the State's legislature. Also, the Court of Appeals opinion would interfere with the way State commissions exercise their regulatory authority by forcing commissions to allocate scarce resources to undertake frequent reviews of utility practices long since determined to be in the public interest. In

short, if left unreviewed, the ruling below will limit State flexibility and encumber State regulators with direct, repeated and intrusive oversight by the Federal judiciary, precisely the result that the State action doctrine was intended to prevent.

ARGUMENT

LEFT UNREVIEWED BY THIS COURT, THE COURT OF APPEALS' DECISION WILL CAUSE UNWARRANTED HARM TO STATE REGULATORY POLICIES AND PROCEDURES

I. This Court has protected the flexibility of State practices and procedures for utility regulation

As this Court has recently acknowledged, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 377 (1983). More recently, the Court has

reaffirmed the constitutional principle that in discharging this important function, the State regulatory commissions have broad authority "to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public." Duquesne Light Co. v. Barasch, 488 U.S. 299, 316 (1989) (Duquesne). In Duquesne, the Court observed that State regulation of utilities providing retail service to their customers is a difficult undertaking, requiring the consideration of a multitude of factors: "The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result." Id. at 314. Accordingly, this Court has been loathe to restrict the flexibility of regulatory bodies, both State and Federal, to exercise their "economic judgment" on behalf of utility ratepayers. Id., see also, FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944);

Permian Basin Area Rate Cases, 390 U.S. 747 (1968); and Mobil Oil Exploration v. United Distribution Companies, 59 U.S.L.W. 4054, 4058 (January 8, 1991), ("'just and reasonable' requirement accords [the Federal Energy Regulatory Commission] broad ratemaking authority. . . .").

In Duquesne, the Court also described the role that regulatory bodies such as the FPSC perform within State government. "[T]he Pennsylvania PUC is essentially an administrative arm of the legislature." 488 U.S. at 313. Accordingly, like legislative bodies, State commissions "must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." Id. at 313-314, citing Permian Basin, supra, 390 U.S. at 767 (emphasis in original). In short, in its analysis of the constitutional limitations

on commission authority, this Court, both historically and quite recently, has sought to protect the flexibility and discretion through which regulatory judgment is exercised by both State and Federal commissioners.

Similarly, this Court's recent antitrust decisions applying the State action doctrine have consistently recognized the need to preserve regulatory flexibility. In applying the two elements of what has come to be known as the Midcal test -- that private anticompetitive conduct which is conducted pursuant to an "affirmatively expressed and clearly articulated" State policy which is "actively supervised" by the State is exempt from antitrust liability -- the Court has not attempted to interfere with the traditional tools State commissions have used to regulate utility rates and

services.[3] The Court has not used the Midcal formulation to micromanage State utility policymaking, whether at the PUC or legislative level, nor has the effectiveness of State regulation been examined with a Federal microscope to determine how "actively" regulators have discharged their responsibilities.

For example, with respect to the "clear articulation" prong of Midcal, the Court in Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985) held that a long-standing decision of the Mississippi Public Service Commission allowing trucking companies to collectively file intrastate rate proposals was sufficient to provide State action immunity to private truckers participating in the collective activity. Id. at 63-64. The Mississippi commission made this decision pursuant to a generalized

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[3] See, California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 87, 105 (1980).

"just and reasonable" rate standard, and not specific authorization from the State's legislature. The Court found this expression of State policy sufficient:

> The statute provides that the Commission is to prescribe "just and reasonable" rates for the intrastate transportation of general commodities. The legislature thus made clear its intent that intrastate rates would be determined by a regulatory agency, rather than by the market. The details of the inherently anticompetitive rate-setting process, however, are left to the agency's discretion. The State Commission has exercised its discretion by actively encouraging collective ratemaking among common carriers. We do not believe that the actions petitioners took pursuant to this regulatory program should be deprived of Parker immunity.
>
> 471 U.S. at 63-64
> (citations omitted)

Even though the Mississippi legislature had enacted no specific legislation with respect to collective ratemaking, the Court attributed to the State as sovereign the decision of its regulatory commission authorizing such activities. Id. at 65. (the State of Mississippi, by the decision

of its public service commission, "has articulated clearly its intent to displace price competition among common carriers with a regulatory structure.")

As in the case of the constitutional limitations on State commission actions, the Court's reasoning in Southern Motor Carriers provides ample evidence that in the context of Federal antitrust litigation, the States are not to be tightly held to specific "tests" which restrict the regulatory flexibility of their commissions. And the reason why it is important to ensure this result is clear:

> If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate a state policy would diminish, if not destroy, its usefulness.
>
> 471 U.S. at 64

Stated differently, if the Midcal formulation's "affirmative expression" standard is construed to require precise compliance by State regulatory commissions with rules made on a case-by-case basis by the Federal judiciary, agency regulation of utilities and carriers will be difficult, if not impossible.

Similar respect for State discretion and flexibility must also apply with respect to the "active supervision" element of the Midcal formulation of the State action doctrine. Until this case, the NARUC is unaware of any decisions of this Court which have assessed a State's "active supervision" of a utility or carriers alleged anticompetitive conduct.[4] However, in a

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[4] In Southern Motor Carriers, supra, "the Government . . .conceded that the relevant States, through their agencies, actively supervised the conduct of private parties." While the Court has assessed State supervision of other industries such as the medical profession, Patrick v. Burget, 108 S. Ct. 1658 (1988), it has not yet examined State utility regulation. This

recent decision, the United States Court of Appeals for the First Circuit reversed a ruling of the Federal Trade Commission which had found that the State of Massachusetts had not sufficiently and actively supervised intrastate motor carrier ratesetting practices. New England Motor Rate Bureau, Inc. v. FTC, 908 F.2d 1064 (1st Cir. 1990). In rejecting the FTC's decision, the Court of Appeals stated

> The FTC's position, at bottom, seems to be that the "active supervision" prong [of Midcal] necessitates an inquiry by the FTC into whether a particular state's regulatory operation demonstrates satisfactory zeal and aggressiveness. The FTC would, in effect, try the state regulator. We think this goes to far.
>
> 908 F.2d at 1075

Rather than a means to "try the regulator", the active supervision standard simply ensures that regulatory procedures are in

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is hardly surprising, given that regulation of utilities is an area in which States pervasively and vigorously exercise their police powers. See, Arkansas Electric Cooperative, supra, 461 U.S. at 377.

place to address the alleged anticompetitive conduct:

> The principles of federalism embodied in Parker dictate the sufficiency of a degree of scrutiny on this level. It is not the province of the federal courts nor of federal regulatory agencies to sit in judgment upon the degree of strictness or effectiveness with which a state carries out its own statutes. It is sufficient that a meaningful scheme of regulation is in existence and that there are sufficient indications that active under the scheme is taking place.
>
> Id. at 1076
> (Fn. omitted and emphasis in original)

The First Circuit's reading of the "active supervision" prong is entirely consistent both with this Court's approach to the "clear articulation" prong in Southern Motor Carriers, and the "end result" test applied by this Court in Hope Natural Gas, supra, and Duquesne, supra to utility ratemaking. This is hardly surprising. It makes little sense for the Federal courts to defer to regulatory expertise for purposes of constitutional analysis (Hope and Duquesne) only to

rigidify State regulatory policymaking and procedures through the threat of antitrust proscription. In sum, the NARUC submits that the State action doctrine, intended to vindicate principles of comity and Federalism, should hardly be a club by which Federal agencies and courts restrict or reorder State regulatory policies and practices.

II. The effect of the Court of Appeals decision

Against this background, the decision of the court below stands in stark relief. In its review of the Florida PSC's regulation of the City Gas territorial agreement, the Court of Appeals held that neither prong of Midcal was satisfied: the State of Florida's regulatory policy was not "clearly articulated and affirmatively expressed" because the FPSC had "expressed doubt" about its authority to approve territorial agreements (App. at A-10), and

the FPSC's regulation of the agreement should have been "a more vigorous, probing supervision" (App. at A-11).

The NARUC agrees with the Petitioner that these holdings are not consistent with this Court's reasoning in its recent State action decisions. However, our concern with the Court of Appeals' ruling is intensely practical. The Court's decision has the effect of restricting regulatory flexibility in a number of ways, each of which will harm State regulation of utilities and carriers.

First, the Court held that the State's service territory policy with respect to gas distribution utilities was insufficient to satisfy Midcal because the legislature had not specifically addressed gas distributors by legislation, and because of the FPSC's "doubts" (App. at A-10). Unless reviewed and reversed by this Court, the effect of this holding is readily apparent. The FPSC, and presumably the commissions of all States

in the Eleventh Circuit, must now reexamine their respective regulatory policies to determine if they need to approach their legislatures for more specific statutory authority to require regulated utilities and carriers to take actions which a private litigant may challenge under Federal antitrust law. These commissions must necessarily question whether their statutory commands to determine whether utility rates are "just and reasonable," or whether new utility service is "in the public convenience and necessity" are specific enough to protect even long-standing regulatory policies. The commissions should be particularly concerned if they have transferred a regulatory policy or practice statutorily prescribed for one utility type to another utility type. Further, these commissions cannot rest on the fact that a given regulatory practice has been explicitly affirmed through State court

review. Under the Court of Appeals ruling, these are now "questions of federal antitrust law." App. at A-10.[5]

Secondly and ironically enough, while they are approaching their legislatures for more specific statutory authority, the commissions of the Eleventh Circuit should not undertake any administrative review of settled policies about which they may have "some doubt." Under the reasoning of the court below, a State commission's mere issuance of a notice of proposed rulemaking

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[5] As Judge Johnson in his en banc opinion correctly observed, the panel's holding means that State regulatory commissions can no longer rely on rulings of their State courts to authoritatively determine "the content. . .of the state law to which federal courts apply the Midcal test. . . ." App. at B-8, citing Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44-45 n. 8 (1985). At least in the context of Federal antitrust litigation, the Supreme Court of Florida, which approved the very territorial agreement at issue in this case, City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965), is no longer the court of last resort concerning the regulatory policies the FPSC is authorized to adopt and implement.

to reopen regulatory issues in light of changing industry circumstances may be subsequently interpreted by a Federal antitrust court as having undermined the State's ability to "clearly articulate and affirmatively express" its regulatory policies. In either case, the Court of Appeals' decision has diminished the ability of State legislatures and commissions to "deal with problems unforeseeable to, or outside the competence of, the legislature." Southern Motor Carriers, supra, 471 U.S. at 64.

So too with respect to the Court of Appeal's ruling on the "active supervision" prong of Midcal. Here, the court below found that the FPSC did not sufficiently supervise its policy on territorial agreements because the Commission only "on occasion, some 15 to 25 years ago, looked at this agreement." App. at A-11. In the Court's view, Midcal requires "a more

vigorous, probing supervision." Id.

The problems caused by this holding are patent. How is the FPSC to know how frequently it needs to review its prior decisions, particularly in an area of regulation such as the establishment of service territories which are invariably intended to be long-lived? Further, how much more "vigorous" can State supervision be than the issuance of a binding order affirmatively finding a given utility practice to be "in the public interest?"[6] The Court of Appeals decision, of course, provides no answers to these important questions. However, regardless of the strain on their time and resources, State commissions in the Eleventh Circuit would be

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[6] The FPSC's order approving the City Gas territorial agreement found "that territorial agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities. . .are definitely in the public interest and should be encouraged and approved. . . ." App. at I-2.

well-advised to undertake a searching reexamination of even long-settled utility practices if they wish to avoid the kind of result suffered by the FPSC.[7]

Clearly, this Court did not intend to impose these sorts of restrictions upon State regulatory flexibility when it decided Midcal and Southern Motor Carriers. The problems created by the Eleventh Circuit's decision are readily apparent: by definition, the regulatory policies and practices State commissions either authorize or impose on utilities and carriers operate in an economic environment based on monopoly

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[7] By contrast, the First Circuit in New England Motor Rate Bureau, supra, "agree[d] with commentators who state that a court. . .should not scrutinize the rigor with which the state supervises the challenged activity to ensure that supervision is more than pro forma." 908 F.2d at 1076 n.18. In so doing, the court indicated its conviction that Federal courts should provide State regulators with the same sort of regulatory discretion in antitrust litigation as they are required to do under the constitutional standards of Hope and Duquesne. Id.

service providers. Accordingly, virtually every decision a State regulatory body makes, including decisions to deregulate industry practices, raises the possibility of anticompetitive concerns. The purpose of the State action doctrine established by Parker and its progeny is to insulate regulatory policies established by the State as sovereign and administered by expert agencies from repeated and intrusive examination by a Federal judiciary ill-equipped for this task. The decision below does not meet the principles of Federalism that Parker embodies, and accordingly, must be reviewed by this Court.

CONCLUSION

For the reasons herein stated, the NARUC respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN GAS ASSOCIATION IN SUPPORT OF PETITIONER

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2, the American Gas Association (hereinafter referred to as "A.G.A." or "the Association") hereby respectfully moves for leave to file the attached brief as amicus curiae in support of City Gas Company of Florida's petition for writ of certiorari. The consent of counsel for petitioner City Gas Company of Florida has been obtained. Counsel for respondent Consolidated Gas Company of Florida, Inc. has objected.

A.G.A. is a national non-profit trade association representing the interests of its approximately 250 member

companies involved in the distribution and transmission of natural gas throughout the United States. Petitioner City Gas Company of Florida (City Gas) is currently a division of Elizabethtown Gas Company, a member of A.G.A. A.G.A. member companies serve approximately 160 million consumers and provide 85 percent of the nation's natural gas utility sales. Almost all local gas distribution company members of A.G.A. operate under state or local franchises or are subject to state public service commission rules or orders that restrict their operating territories to defined geographical areas.

This case raises important concerns regarding the interplay between the federal antitrust laws and the deference due state public utility regulatory commissions under the state action doctrine. Of particular concern to the Association is the lower courts' holdings in this case that the state action doctrine does not immunize a territorial agreement between two gas utilities where that agreement was (1) specifically approved by a state public utility commission as being in the public interest and (2) upheld by the state's highest court as a necessary exercise of the state public service commission's authority. The Association believes this opinion is contrary to controlling precedent and could lead to decisions undermining the authority of state legislatures and state public service commissions to use state police powers to regulate effectively local natural gas distribution companies.

The Association's concern with the lower courts' decisions arises out of its beliefs that these courts have (1) misinterpreted the state action immunity doctrine and (2) misunderstood the central role of territorial restrictions in the regulation of natural gas distribution companies. The attached *amicus curiae* brief is intended to explain the important role territorial restrictions play in regulating gas utility companies. In this brief the Association traces the role of territorial restrictions in public utility regulation and why such restrictions have been

determined to be critical in protecting utility customers from excessive rates and charges. The generally recognized goal of public utility regulation is to ensure safe, reliable service to utility customers on reasonable terms and conditions. To achieve these goals state public utility commissions have adopted, promoted or approved territorial restrictions that have the effect of limiting direct competition between local gas distribution companies.

This perspective on the role of territorial agreements in utility regulation has not been brought to the Court's attention in petitioner's brief. The Association believes that a failure to understand the regulatory importance of territorial restrictions may lead to further intrusion by federal courts into an area pervasively regulated by state public utility commissions. The Association believes it has a unique and important perspective on this issue which should be useful to the Court in determining the desirability of granting the requested writ of certiorari.

For the reasons stated above, the Association respectfully requests the Court grant this motion so that it may present its views in the attached brief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-953

CITY GAS COMPANY OF FLORIDA,
Petitioner,

v.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN GAS ASSOCIATION IN SUPPORT OF PETITIONER

The American Gas Association (hereinafter "A.G.A." or "the Association") submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed by petitioner City Gas Company of Florida (City Gas).

INTEREST OF THE *AMICUS CURIAE*

The A.G.A. is a national trade association representing the interests of some 250 member companies involved in the distribution and transmission of natural gas throughout the 50 states and the District of Columbia. A.G.A. member companies account for approximately 85% of this nation's annual gas utility sales. The vast majority of A.G.A.'s member companies distribute natural gas to residential, commercial and industrial customers and are extensively regulated by state public utility commissions. Almost all local gas distribution company members of

A.G.A. operate under state or local franchises or are subject to state public service commission rules or orders that restrict their operating territories to defined geographical areas.

The Association requests this Court grant the writ of certiorari for the reasons set forth in the petition of City Gas. The Association is particularly concerned with that portion of the opinion of the United States Court of Appeals for the Eleventh Circuit holding that the state action doctrine does not immunize a territorial agreement that was specifically approved by a state public utility commission as being in the public interest and upheld by the state's highest court as a necessary exercise of the state public service commission's authority. This holding is contrary to controlling precedent and could undermine the authority of state legislatures and state public service commissions to use state police powers to regulate effectively local natural gas distribution companies.

The Association believes the Eleventh Circuit decision and the district court opinion could call into question numerous franchises, territorial agreements, public utility commission decisions and state laws which have been designed and operated to provide detailed state and local regulation of natural gas distribution companies. Many of the prevailing utility regulatory structures developed over the last century in this country would have to be reexamined and modified if the Eleventh Circuit's narrow reading of the state action doctrine were to be followed.

The issuance and control of franchises and the creation of territorial arrangements and restrictions are activities that go to the very core of public utility regulation. As discussed below, states have developed various mechanisms to control and monitor these territorial restrictions. These restrictions and procedures have developed over the past one hundred years based upon a generally held belief that the provision of natural gas service is a natural monopoly that is best allowed to operate subject to

strict state scrutiny.[1] The Association is concerned that the Eleventh Circuit's opinion fails to comprehend the intense scrutiny under which natural gas companies operate and fails to provide proper deference to the decisions of the Florida state legislature, the Florida Public Service Commission, and the Florida Supreme Court.

SUMMARY OF ARGUMENT

The Eleventh Circuit erred in holding that the state action did not immunize a gas utility's conduct under a territorial agreement examined and approved by a state public utility commission as being in the public interest. Absent review of this decision and its reversal by this Court numerous utility franchises, territorial agreements, public utility commission decisions and state laws may be called into question.

The lower courts' decisions potentially undermine the ability of state public utility commissions to maintain and enforce a comprehensive scheme of state regulation by calling into question the present use of territorial restrictions on local natural gas distribution companies. The opinions below fail to comprehend the central role such restrictions play in the regulation of public utilities and the problems associated with the use of antitrust laws to override these restrictions. Territorial restrictions were developed to avoid forcing captive utility customers to pay uneconomic and unnecessary costs.

The lower courts' decisions also countermand an express state statutory command barring any entity from requiring a public utility to sell natural gas at wholesale. The courts' decisions strike at the core of the state action doctrine by attempting to read out of existence an express and unequivocal legislative dictate.

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[1] *See, e.g.*, J.C. Bonbright, A.L. Danielsen, D.R. Kamerschen, *Principles of Public Utility Rates*, at 633 (2d ed. 1988) ("Local [gas] distribution companies are generally conceded to be natural monopolies.") and at 17-25 (discussion of natural monopolies).

Review of the Eleventh Circuit's *en banc* opinion is necessary to clarify the deference to be accorded state public utility commissions in their regulation of public utilities and to allow this Court to determine the proper application of the state action doctrine to the conduct of public utilities in areas where their actions are subject to on-going review by public utility commissions.

ARGUMENT

City Gas is a local gas distribution company selling gas within a service territory in Southern Florida. The boundaries of this service territory were set in 1960 and were embodied in a Territorial Agreement between City Gas and another local gas distribution company. This Territorial Agreement was submitted to the predecessor of the Florida Public Service Commission (Commission or PSC) for its approval. The Commission studied the Territorial Agreement and found it to be in the public interest. Pet. App. I. The Commission in its Order approving the agreement set out detailed reasons why this territorial agreement was in the public interest and found that this agreement would avoid "unnecessary and uneconomical duplication of plant and facilities . . . ." Pet. App. I-2. Without such an agreement, gas customers would be harmed by such duplication and would be forced to pay higher rates for essential services. *Id.* The Commission's views on this issue were then, and are now, widely held by public utility commissions and noted authorities in the field of public utility regulation.[2]

A few years after the Florida Public Service Commission approved the Territorial Agreement, a dispute arose

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[2] *See, e.g.*, C.F. Phillips, Jr., *The Economics of Regulation* (1965) at 85 ("[c]ompetition in certain industries is apt to become ruinous to the disadvantage of both consumers and investors."); J.C. Bonbright, A.L. Danielsen, D.R. Kamerschen, *Principles of Public Utility Rates*, at 19 (2d ed. 1988) (competition between public utilities "is wasteful of resources because it involves unnecessary duplication of facilities.").

between the parties to the agreement. City Gas challenged the validity of the Territorial Agreement, arguing that the Florida Commission lacked statutory authority to approve the agreement and the agreement violated state antitrust laws and the Sherman Act. Both the Third Circuit District Court of Appeal of Florida and the Supreme Court of Florida found the Commission had authority to approve the agreement and that the agreement, as approved, did not violate Florida antitrust laws.[3] The state Supreme Court found that "the practical effect of [the Commission's] approval is to make the approved contract an order of the commission, binding as such upon the parties."[4] The Court also found that the agreement could not violate state antitrust law because it did not threaten "to result in monopolistic control over prices, production, or quality of service . . . ."[5] According to the state Supreme Court, such monopolistic abuses could not occur because of the Commission's "very extensive authority over the fortunes and operation of the regulated entities."[6]

I. THE ELEVENTH CIRCUIT'S MAJORITY OPINION FAILS TO COMPREHEND THE PERVASIVE NATURE OF STATE PUBLIC UTILITY COMMISSION REGULATION AND THE ROLE OF TERRITORIAL RESTRICTIONS IN THE REGULATION OF LOCAL NATURAL GAS DISTRIBUTION COMPANIES.

The district court and the panel below in its opinion concluded that the Territorial Agreement between City Gas and Peoples Gas violated Section 2 of the Sherman

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[3] The two courts did not address the federal antitrust claims. The trial court, which had held the Territorial Agreement violated Florida antitrust law, did not rule on the federal claim.

[4] City Gas Company v. Peoples Gas System, Inc., 182 So. 2d 429, 436 (Fla. 1965).

[5] *Id.* at 434.

[6] *Id.* at 435.

Act and was not immune under the state action doctrine. In an *en banc* opinion the Eleventh Circuit affirmed this conclusion by a 5-5 vote. Chief Judge Tjoflat's dissenting opinion (Pet. App. B-141-59) demonstrates clearly that this territorial agreement was subject to a clearly articulated and affirmatively expressed state policy that was actively supervised by the state itself.[7]

To better understand Florida's pervasive utility regulatory scheme it is helpful to understand the role of utility geographic and market restrictions generally and their impact on utility rates. The State of Florida's structure for regulating natural gas utilities shares significant features with the regulatory structures adopted in most other states. These regulatory structures grew out of a rich history of experiments in public utility regulation and attempts to use state police power to regulate gas utilities in the public interest.

The regulation of natural gas utilities and the imposition of territorial restrictions developed simultaneously during the nineteenth century. Exclusive franchises to early gas lighting companies were first granted in the early 1800's by cities and state legislatures.[8] However, "the franchise as actually used proved a defective instrument for public regulation."[9] They were often poorly drafted, inflexible, and not suited for protecting the public interest in safe, cost-efficient and reliable gas service.[10]

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[7] *See* California Retail Liquor Dealers Association v. MidCal Aluminum, Inc., 445 U.S. 97, 100 (1980). Consistent with this Court's Rule 37.1, A.G.A. will not repeat the discussion and analysis of the state action doctrine contained in petitioner's brief. A.G.A. supports that analysis.

[8] *See* I *Regulation of the Gas Industry*, § 1.04 (American Gas Association ed. 1990).

[9] C.F. Phillips, Jr., *The Economics of Regulation* at 88 (1965) (hereinafter Phillips).

[10] *Id.* at 88-90.

Direct regulation by state legislatures also proved ineffective. The Court's 1898 decision in *Smyth v. Ames* [11] was said to sound the "death knell" for efforts of state legislatures to regulate utilities directly.[12] "It did this by setting up such an exacting set of standards . . . for determining the reasonableness of utility rates, that it became apparent that regulation was a full-time job. . . . [A]s a result of *Smyth v. Ames* state regulatory commissions, meaning specifically organized boards, with powers over specified utility operations, became a virtual necessity." [13]

There were practical as well as economic reasons for state commissions to be able to impose territorial restrictions on local natural gas distribution companies. As a practical matter, allowing competing gas distribution companies to operate in the same geographical area raised safety and operational concerns. City streets would be dug up twice as often as competing gas companies installed competing lines. Multiple and duplicative gas lines increased safety concerns regarding gas leaks. Perhaps more importantly, such competition led to higher, not lower, gas consumer rates because a regulated natural gas utility is required to be allowed a fair return on its investment in plant and equipment.[14] If two gas lines were built and maintained where one gas line would be adequate, gas company customers would be forced to absorb these higher costs through higher rates. Thus, the creation of competition in areas characterized as natural monopolies leads not to reduced costs but to higher costs and economic waste. This situation led to state laws de-

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[11] 169 U.S. 466 (1898).

[12] Phillips at 85.

[13] F.X. Welch, *Cases and Text on Public Utility Regulation* at 543 (Public Utilities Reports, Inc., 1961), *as quoted in* Phillips at 85.

[14] *See, e.g.*, Smyth v. Ames, 169 U.S. 466 (1898); C.F. Phillips, Jr., *The Regulation of Public Utilities* at 4-7, 301-42 (Public Utilities Reports, Inc. 1988).

signed to allow state public commissions to control the growth of public utilities to afford control over the utility's rate base and, ultimately, consumer rates.

Almost every state having investor-owned natural gas utilities making retail sales within the state regulates the gas utilities' rates.[15] The vast majority of states also require a certificate of public convenience and necessity before an investor-owned gas utility may initiate service.[16] Most states further require such a certificate before a natural gas utility may abandon facilities or service.[17]

> The certificate of public convenience and necessity is vital at both state and federal regulatory levels. By what is the substantially uniform rule, no public utility may commence the construction of major facilities, begin operations or abandon them, *enter new territory, exercise rights under a franchise,* or issue securities, among other functions, until it has obtained from the commission having jurisdiction a certificate to the effect that the present or future public convenience and necessity require or will require the action contemplated. Most utilities are controlled monopolies (at least to greater or lesser extents) and the certificate of public convenience and necessity, as granted, conditioned, denied, withdrawn or modified, implements that control.[18]

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[15] 1 *Energy Law and Transactions* § 4.03[2][b] (1990); National Association of Regulatory Utility Commissioners, *1989 Annual Report on Utility and Carrier Regulation,* Table 4 at 558 (1990) (hereinafter *NARUC Report*).

[16] *NARUC Report,* Table 67 at 560 and Table 62 at 549.

[17] *NARUC Report,* Table 68 at 562.

[18] A.J.G. Priest, *Principles of Public Utility Regulation,* Vol. 1 at 347 (1969) (emphasis added). *See also* 1 *Energy Law and Transactions* at § 2.05[1]; C.F. Phillips, Jr., *The Regulation of Public Utilities* at 515-16 (Public Utilities Reports, Inc. 1988) ("Certificates of public convenience and necessity are required to provide public utility services. . . . The intended purpose of such [entry]

Not all states have adopted the use of a formal certificate of public convenience and necessity to control the service territory of a natural gas utility.[19] Florida is one such state that has not deemed it necessary to require the issuance of a formal certificate document.[20] However, even those few states that do not use a formal certificate or franchise arrangement to allocate utility territories have the ability to restrict territorial competition by the use of other measures. For example, a large number of states, including Florida, authorize the public utility commission to regulate natural gas utilities by authorizing or requiring interconnections of gas lines,[21] requiring joint use of facilities,[22] and requiring line extensions within the area served.[23]

Florida, along with most states, also has in place a number of statutory provisions that empower the public

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control is to regulate competition *within* each industry, thereby preventing over-investment in high fixed-cost industries and encouraging the achievement of economies of scale.").

[19] *See NARUC Report*, Tables 67, 68, 69, 70, 71, 72, 73A, 73B, and 74, at 560-76.

[20] Following the district court's opinion the Florida Legislature did codify existing Commission authority over territorial agreements between natural gas companies. That provision expressly authorizes the Commission to "approve territorial agreements between and among natural gas utilities" and to resolve territorial disputes. Significantly, the new provision is not intended "to alter existing territorial agreements between the parties to such agreements." Fla. Stat. Ann. § 366.04(3) (1989 Supp.). The state senate committee staff report which led to the 1989 amendment makes it clear that the amendment was intended to overturn the interpretation adopted by the lower courts in this case. *See* Staff of Senate Economic, Professional and Utility Regulation Committee, *A Review of Chapter 366, Florida Statutes Relating to Public Utilities* at 35 (1989).

[21] *NARUC Report*, Table 62 at 549.

[22] *NARUC Report*, Table 63 at 551.

[23] *NARUC Report*, Table 63 at 551; Fla. Stat. Ann. § 366.05.

service commission to control the types of anticompetitive practices that the federal antitrust laws are designed to combat. For example, Florida's public utility statutes provide: "[n]o public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect";[24] the Commission "shall have jurisdiction to regulate and supervise each public utility with respect to its rates, *service* . . .";[25] the Commission "shall have the power to prescribe . . . *service rules* and regulations to be observed by each public utility";[26] the Commission may require "*additions and extensions to the plant and equipment of any public utility reasonably necessary to promote the convenience and welfare of the public*";[27] and "to prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this chapter; and to exercise all judicial powers, issue all writs and do all things, necessary or convenient to the full and complete exercise of its jurisdiction and the enforcement of its orders and requirements."[28] If the Congress finds a utility practice affecting rates to be "unjust, unreasonable, insufficient, or unduly discriminatory or preferential, or in anywise in violation of law, *or any service is inadequate or cannot be obtained*" the Commission is required to promulgate "rules, regulations, measurements, practices, contracts *or service*" to be imposed in the future.[29] Finally, Commission orders are re-

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[24] Fla. Stat. Ann. § 366.03.

[25] *Id.* § 366.04 (emphasis added).

[26] *Id.* § 366.05 (emphasis added).

[27] *Id.* (emphasis added).

[28] *Id.*

[29] *Id.*, § 366.07 (emphasis added). As discussed, *supra*, territorial restrictions are practices that affect utility rates and in their absence there is duplication of facilities. Because each public utility

viewable by the state supreme court [30] and willful violations of the public utility laws or Commission rules are punishable by a fine not to exceed $5,000 per day.[31]

The above statutory provisions, coupled with the Commission's more detailed regulations, clearly provide the requisite authority to approve territorial restrictions. Moreover, the Florida Supreme Court has determined that the Commission has indisputable authority to modify any service territory agreements it may have approved. As the Florida Supreme Court stated in one of its decisions dealing with the Territorial Agreement at issue here:

> Nor can there by any doubt that the Commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public.[32]

It is within the context of the nature of public utility regulation generally and Florida's statutory framework specifically, that this Court must examine state actions involving territorial restrictions on natural gas utilities. The language embodying Florida's statutory scheme must be examined in light of two beliefs central to na-

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is entitled an opportunity to earn a reasonable return on its facilities, such duplication causes an increase in consumer rates. *See* FPSC Order No. 3051, In re: Territorial Agreement between Peoples Gas System, Inc. and City Gas Company of Florida, Pet. App. I-2; W.K. Jones, Origins of the Certificates of Public Convenience and Necessity: Developments in the States, 1870-1920, 79 Col. L. Rev. 426, 433 ("The earning power of a [public service] company was directly proportional to its investment or 'rate base': a larger investment meant a larger constitutionally mandated return, which in turn meant higher rates for the company's customers.").

[30] *Id.* § 366.10.

[31] *Id.* § 366.12.

[32] Peoples Gas System, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966).

tural gas utility regulation within this country. First, that the public interest is not served by fostering direct competition between local natural gas utilities and, second, that to the extent any such competition is to be condoned, it must be specifically authorized and regulated by a state public service commission.

As Chief Judge Tjoflat stressed in his dissenting opinion, the district court erred in overemphasizing the absence of an express grant of power to approve territorial agreements between natural gas utilities. Pet. App. B-149. That power was embodied in Chapter 366 of the Florida statutes, which, as discussed above, prescribes the duties of Florida utility companies and the very broad responsibilities of the Florida Public Service Commission. Given the near universal consensus in this country opposing direct competition between natural gas utilities, the appropriate question is whether the Florida legislature intended to act in a manner inconsistent with well-established regulatory precepts embraced by the vast majority of states. The evidence in this record suggests it did not. The similar concerns with the lower courts' interpretation of Florida law raised by the Florida Public Service Commission in its briefs *amicus curiae* and the subsequent action by the Florida legislature to amend the statute to expressly authorize the Florida PSC to approve territorial agreements between natural gas companies (Pet. App. B-149 n.85) makes clear that there is in Florida a clearly articulated, affirmatively expressed and actively supervised state policy in favor of territorial restrictions on natural gas utilities. As this Court has recognized, "[r]equiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness." [33]

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[33] Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 64 (1985).

II. THE LOWER COURTS' DECISIONS EVISCERATE THE FLORIDA LEGISLATURE'S CLEAR COMMAND BARRING ANY ENTITY FROM REQUIRING A PUBLIC UTILITY TO MAKE A SALE FOR RESALE.

The district court concluded that City Gas' refusal to sell gas to Consolidated on terms acceptable to Consolidated constituted an illegal refusal to deal in violation of § 2 of the Sherman Act and ordered City Gas to furnish gas to Consolidated. Pet. App. D-95-6. The lower Court's actions ignore the Florida state legislature's express determination that natural gas utilities shall not be required to provide service for resale. The Florida legislature has explicitly provided by statute that "no public utility shall be required to furnish electricity or gas for resale. . . ." Fla. Stat. Ann. § 366.03 (Harrison 1980). It is difficult to imagine a clearer statement by a state legislature that it does not wish to impose a duty on an otherwise heavily-regulated company. City Gas is a public utility as defined by the statute[34] and thus may not be required to serve Consolidated.

The district court's opinion undermines the plain meaning of the statute in two ways. First the court speculates that the state's sole concern was that requiring utilities to make sales for resale would leave the rates for sale of this gas to ultimate consumers beyond the jurisdiction of the Florida PSC. Pet. App. D-81-2. However, the evidence supporting this supposition appears to suggest that the state was concerned with protecting broader interests. The District Court stated that "the statute appears to be derived from *Florida Power & Light Co. v. State ex rel. Malcolm*, 107 Fla. 317, 144 So. 657 (1932)." A reading of that case makes clear that the Florida Supreme Court's holding that a utility could not be compelled to make a sale for resale was based on a utility's right to have enforced its reasonable regulations. The concern

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[34] Fla. Stat. Ann. § 366.02.

expressed by the District Court, although mentioned in the opinion, was found by the Florida Supreme Court to be "not necessary to be decided in this case; therefore no opinion is expressed thereon." *Florida Power & Light Co. v. State ex rel. Malcolm*, 144 So. at 659. If the legislature's sole concern was to protect consumers from paying rates not subject to Florida PSC jurisdiction it could have written the statute to deal with this narrow problem. Instead it imposed an absolute bar on any entity requiring a public utility to furnish gas for resale.[35] Given the plain language of the statute, it was clearly error for the lower courts to eviscerate it without a clearer basis for divining the legislature's statutory intent.

The district court's second ground for reading away the plain language of § 366.03 is that there was inadequate active state supervision under the second prong of

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[35] There may be a number of reasons why the Florida legislature would wish to impose this broad bar. First, for the reasons discussed above, it could well have been concerned with preserving an existing gas company's natural monopoly against any attempts to undermine it. Second, the Florida legislature may have been concerned with possibly subjecting a local gas company to regulation by the Federal Power Commission. The Natural Gas Act provides that the Federal Energy Regulatory Commission (formerly the Federal Power Commission) shall regulate companies engaged in the "sale in interstate commerce of natural gas for resale for ultimate public consumption . . . ." 15 U.S.C. § 717(b) (1982). In 1954 the Natural Gas Act was amended to provide that federal regulation would not apply to a company that engaged in a sale for resale if the gas was received from another person within or at the boundary of a state. 15 U.S.C. § 717(c). Thus if a local gas distribution company were to engage in a sale for resale and received the gas outside the state it would be regulated by the Federal Energy Regulatory Commission as a natural gas company. A simple way to avoid a possible conflict between state and federal regulation is to do what the Florida legislature did—bar anyone from requiring the gas utility to make a sale for resale.

the *Midcal Aluminum*[36] test. Pet. App. D-66-8. However, if the Florida legislature, in its capacity as sovereign, acts to bar the imposition of some duty by statute, conduct consistent with the statute is exempt from antitrust liability.[37] Here the state has spoken by statute and has left no room for another supervisory body to act. The statement that "no public utility shall be required to furnish electricity or gas for resale" ties the hands of all and requires no implementing action by the Florida PSC.

Given the plain language of Fla. Stat. § 366.03 barring anyone from forcing a gas company to sell gas for resale, the Association is greatly concerned that the court's opinion will subject to attack other state statutes that spell out precise duties and restrictions applicable to public utility companies. Our concern is heightened particularly because the Florida legislature seemingly took great pains to avoid such a result. The Florida "Legislative declaration" that opens the chapter on regulation of public utilities prominently states that "this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose." Fla. Stat. Ann. § 366.01. As discussed above, there is broad consensus among utility regulators in this country that competition between local gas distribution companies is contrary to the public welfare. Given this generally held view it is particularly egregious for a district court to be able to ignore the dictates of a clear statutory command on one hand, while

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[36] California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

[37] In finding that a state action is exempt from antitrust liability the "only requirement is that the action be that of 'the State acting as a sovereign.'" *Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) *quoting Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977). "[W]hen a state legislature adopts legislation, its actions constitute those of the State . . . and ipso facto are exempt from the operation of the antitrust laws." *Hoover v. Ronwin*, 466 U.S. at 567-68.

imposing a crabbed and unreasonably confining interpretation of a state's public regulatory scheme on the other. To do so raises the *Midcal* "clear articulation" standard far above the level this Court has set and suggests "an unrealistic view of how legislatures work and of how statutes are written." [38]

III. SUPREME COURT REVIEW IS WARRANTED TO CLARIFY THE "ACTIVE SUPERVISION" PRONG OF *MIDCAL* AS IT IS APPLIED TO THE REGULATORY SCHEME UNDER WHICH UTILITY REGULATORY COMMISSIONS OPERATE.

Of particular concern to the Association is the lower courts' characterizations of the Florida Public Service Commission's oversight of territorial agreements. The district court stated that it appears:

> The FPSC enforces the agreement or considers its revision, after a hearing, *only* when someone complains to it or petitions for a review of the agreement. The FPSC does not review the agreement on its own initiative. . . . There is no evidence that the FPSC has established any standards for the creation of territorial agreements or that territorial agreements are reviewed on a regular basis in the absence of a petition by a party or utility customer for reconsideration. On this record, we find that the FPSC does not adequately supervise natural gas territorial agreements and accordingly, we must conclude that the second prong of the *Midcal Aluminum* test has not been met.

Pet. App. D-67-8.

The Eleventh Circuit's opinion, in the same vein:

> Simply because the Commission has on occasion, some 15 to 25 years ago, looked at this agreement does not automatically immunize it from federal antitrust

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[38] Town of Hallie v. City of Eau Claire, 471 U.S. 34, 43 (1985).

> scrutiny. . . . This is at bottom an agreement entered into by private parties, in pursuit of their own economic interests, that is neither authorized by the State, nor closely monitored by it. The minimal contact the Commission has had with this agreement is nothing more than a "gauzy cloak of state involvement" which does not protect it from the constraints of federal antitrust regulation. *Midcal*, 446 U.S. at 106, 100 S. Ct. at 943.

Pet. App. A-11.

As previously noted, Florida's statutory scheme provides a far greater level of scrutiny than indicated by the above language. Territorial agreements are not valid unless approved by the Commission;[39] may be terminated or modified by action of the Commission;[40] and action to modify or terminate agreements may be initiated by the Commission, a party to the agreement, or any interested member of the public.[41] Florida thus vests its regulatory commission with utility regulatory powers similar to those found in practically every other state. To find, as the lower courts have done here, that this regulatory scheme fails to pass muster under the "active supervision" prong of *Midcal* raises serious concerns among our member companies. Under the Eleventh Circuit's reading of the law, it appears that to maintain antitrust immunity for public utility commission-approved territorial restrictions, a natural gas distribution company would be required to resubmit all such territorial restrictions to its state commission for periodic review. Even such resubmissions to state commissions would not appear to be adequate. Instead it would appear necessary for the state commission to hold some type of hearing.

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[39] Order Approving Agreement, Pet. App. I-2; City Gas Co. v. Peoples Gas System, 182 So. 2d at 436.

[40] Peoples Gas System, Inc. v. Mason, 187 So. 2d at 339.

[41] *Id.*

The Association submits such a result is neither practical nor desirable. In most states any interested ratepayer may participate in utility regulatory proceedings.[42] Almost every state also represents its citizens' concerns through the utility commission staff, a separate people's counsel or both.[43] Competitors and would-be competitors alike may challenge existing regulatory practices. State consumer groups or other ad hoc groups routinely participate in utility proceedings. Thus, state public utility commissions are not shielded from the public spotlight and any arguably anticompetitive actions can be and will be subject to scrutiny. Given the framework of public utility regulation, great deference should be given to public utility commission actions that restrict competition to further the public interest.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[42] *See NARUC Report*, Tables 15 and 16 at 430-43.

[43] *See id.*, Table 237 at 934-36 (state representation of consumer interest other than by regulatory agency); Table 226 at 905-06 (agency provision of assistance to intervenors).

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Petitioner,

v.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Edison Electric Institute ("EEI") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The written consent of the petitioner, City Gas Company, has been obtained. The consent of the respondent, Consolidated Gas Company, was requested, but refused.

EEI is the association of the nation's investor-owned electric utility companies. EEI has not participated previously in the instant case either as a party or as *amicus curiae*. However, several member companies of EEI prepared and filed a brief *amicus curiae* in support

of the petitioners when the case was pending before the Eleventh Circuit Court of Appeals sitting *en banc*.

EEI is concerned that the circuit court's decision will have significant impact on electric utilities that are subject to state regulation of service, price, territories and other aspects of their businesses. As pervasively regulated entities, EEI's members are vitally interested in the standards for the application of the state action immunity doctrine to state regulatory processes and the activities of regulated entities pursuant to those processes.

In addition, EEI's members have developed and operate extensive networks of electric transmission and distribution facilities which may be subject to claims under the so-called essential facilities doctrine. In view of EEI members' significant investment in these facilities on behalf of their customers, EEI has a keen interest in the evolution of monopolization principles applicable to regulated public utilities, and in particular, in the possible recognition of the essential facilities doctrine as an independent form of monopolization analysis.

EEI believes that the brief it seeks permission to file will present the Court with useful discussion of several issues which are not likely to be contained in the briefs of the parties. These issues include: a discussion of the likely effect of the circuit court's decision on other state utility territorial statutes; a suggested standard for determining whether state regulatory schemes constitute sufficient state action for purposes of applying state action immunity; a discussion of the federalism implications of the lower court's state action standard; and a discussion of the adverse effect that the circuit court's use of the "essential faciilties" theory would have on regulated entities.

This the 15th day of February, 1991.

Respectfully submitted,

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---

BRIEF *AMICUS CURIAE* OF THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Edison Electric Institute ("EEI") is the association of the nation's investor-owned electric utility companies. Its members generate approximately 78 percent of all electricity in the country and serve 74 percent of the nation's electricity users.

The members of EEI are subject to extensive service and price regulation at the state level. As electric utilities subject to state regulatory supervision, the members of EEI are concerned that the decision of the circuit court will have impact far beyond its direct effect on two gas suppliers in Florida. The circuit court's decision significantly and improperly restricts the protection afforded to regulated private parties by the state action doctrine and,

in so doing, may put investor-owned utilities at risk of antitrust litigation for actions taken in compliance with state regulatory policy. Moreover, the circuit court's holding may further affect regulated utilities by unduly burdening and interfering with the proper functioning of the state mechanisms that regulate virtually every aspect of the electric utility industry.

In addition, EEI's member companies have developed and operate vast networks of electric transmission and distribution facilities. These facilities are vital to the provision of reliable electric service to utility customers in all parts of the nation. In recent years, however, EEI members have been confronted with conflicting demands for access to these facilities from independent generators of electricity and wholesale customers whose demands are frequently at odds with the interests of utility retail customers. These demands are often accompanied by threats of antitrust suits if the demands are not met. EEI believes that the circuit court's misguided application of the "essential facilities" doctrine creates dangerous uncertainty concerning the legal standard applicable to such demands. If not corrected, this uncertainty and the resulting treble damage exposure is likely to skew decision-making regarding requests for access to transmission facilities, and may force utilities to grant access to such facilities without proper regard for the reliability, economic and consumer welfare concerns that should guide these decisions.

SUMMARY OF ARGUMENT

EEI files this brief as *amicus curiae* to express its concerns over the holding below, which resulted from the *en banc* circuit court's inability to reach agreement concerning the basic issues in this case. The approach taken by the panel, which was affirmed per curiam by the *en banc* court, is inconsistent with the federalism concerns that underlie the *Parker* doctrine because it needlessly embroils the federal courts in the interpretation of state statutes, even when such statutes have already been

clearly interpreted by the highest court of the state. Moreover, the decision below reflects an unwarranted federal court mistrust of state administrative processes.

EEI also takes issue with the circuit court's misguided monopolization analysis. By focusing on facilities rather than markets, the decision obligates Petitioner to deal in a market in which it had not previously participated, without analyzing the extraordinary implications of such a pronouncement. In addition, the decision creates considerable uncertainty concerning the circumstances under which a utility's facilities may be viewed as "essential" and the terms upon which they must be shared with competitors.

ARGUMENT

The Eleventh Circuit was sharply divided over the central issues in this case, with three Judges dissenting, two Judges concurring in part and dissenting in part, and only five Judges agreeing to affirm completely. In fact, five Judges would have found *Parker* immunity with respect to the territorial agreement. The division on all points, and the strong and well-reasoned dissent of the Chief Judge, indicate a pressing need for additional guidance from this Court concerning the application of the state action and essential facilities doctrines to regulated public utilities.

I. THE CIRCUIT COURT'S DECISION DISTORTS THE STATE ACTION DOCTRINE AND INTERFERES WITH STATE REGULATION OF UTILITIES

The circuit court in 1989 should have found City Gas to be exempt from the federal antitrust laws for the same reasons that the Florida Supreme Court found City Gas to be exempt from the state antitrust laws in 1965. The Florida Supreme Court acknowledged in its 1965 decision that the territorial agreement between City Gas and Peoples Gas could be viewed as inconsistent with the state antitrust laws. After examining the provisions of

chapter 366 of the Florida statutes [1], however, the court determined that the extensive authority of the Florida Railroad and Public Utilities Commission (now the Florida Public Service Commission ("FPSC")) over the fortunes and operations of regulated utilities was sufficient to ensure that gas suppliers in Florida did not have "monopolistic control over prices, production, or quality of service." *City Gas Co. v. Peoples Gas Sys., Inc.*, 182 So.2d 429, 435-6 (Fla. 1965). The court therefore sustained the FPSC's approval of the very territorial agreement at issue in this case.

For nearly fifty years, the *Parker* doctrine has represented in federal antitrust law "a judicially crafted accommodation of state sovereignty." [2] The failure of the lower courts, in this case, to apply the protection of the state action doctrine to a territorial agreement permitted by a state statutory framework, approved by a state public service commission [3], and upheld by a state supreme court has alarming implications because it radically alters both aspects of the *Midcal* formulation.[4]

A. Clear Articulation

In reinstating the panel opinion, the circuit court approved the district court's conclusion that no *"clearly* articulated state policy authorized this [territorial] agreement." *Consolidated Gas Co. v. City Gas Co.*, 880 F.2d 297, 303 (11th Cir. 1989) (panel opinion) (emphasis in

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[1] *Fla. Stat.* ch. 366 (Supp. 1990).

[2] Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227, 228 (1987) (citing *Parker v. Brown*, 317 U.S. 341 (1943)).

[3] The territorial agreement entered into by City Gas and Peoples Gas was submitted to and formally approved by the FPSC. *See FPSC Order No. 3051*, Docket No. 6231-GU (1960) (Pet. App. I). Under settled Florida law, that agreement thereupon became an *order* of the FPSC which could not be deviated from without the prior approval of the FPSC. *Peoples Gas Sys., Inc. v. Mason*, 187 So.2d 335 (Fla. 1966).

[4] *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 87 (1980).

original). According to the panel, the absence of express statutory authorization for gas territorial agreements and the uncertainty with which the FPSC approached territorial disputes muddied the question of whether Florida lawmakers intended to permit territorial regulation. As Petitioner notes,[5] the circuit court reached this conclusion by ignoring a controlling decision of the Florida Supreme Court holding that Florida lawmakers did intend to permit regulation of utility service areas.[6]

The Florida decision should have ended the inquiry because, as long as the state sovereign clearly intends to displace competition with a regulatory structure in a particular field, the first prong of the *Midcal* test is satisfied. *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Consolidated Gas*, 912 F.2d 1262, 1265 (11th Cir. 1990) (en banc) (Johnson, J., dissenting in part); *id.* at 1331-33 (Tjoflat, C.J., dissenting). Given the Florida Supreme Court's clear interpretative guidance concerning the FPSC's authority to approve territorial agreements, the circuit court should have refrained from independently analyzing Florida law. As this Court has cautioned,

> [r]equiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the funda-

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[5] Petition at 16 (citing *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6 (1987) (quoting *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974) ("We may not 'construe a state statute contrary to the construction given it by the highest court of a State.' ")).

[6] *See City Gas Co. v. Peoples Gas Sys., Inc.*, 182 So.2d at 436. Indeed, this controlling Florida decision is but one of a long line of Florida decisions confirming the FPSC's "effective control over areas of [utility] service," and approving the FPSC's efforts to prevent wasteful duplication of utility distribution facilities. *See id.*; *see, e.g., Lee County Electric Coop. v. Marks*, 501 So.2d 585, 587 (Fla. 1987).

> mental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny.

Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44 n.7 (1985). Instead, the circuit court undertook to embroil itself in second-guessing the Florida court's view of Florida law.[7]

In *Town of Hallie* this Court acknowledged that it had never "fully considered precisely how clearly a state policy must be articulated . . . to establish that [an] anticompetitive activity constitutes state action." 471 U.S. at 42. In considering that issue, the Court held that a state statute need not explicitly declare legislative intent to supplant competition with regulation. Rather, it is sufficient if a reading of the statute indicates that the state legislature "clearly contemplate[d]" anticompetitive activity, or that such conduct is a "foreseeable" or "logical" result of the authority delegated. *Id.* In their dissents from the circuit court's opinion, Judges Tjoflat and Johnson both employed this test and concluded that the district court's interpretation of the legislative intent behind chapter 366 overemphasized the absence of an express power to approve territorial agreements between natural gas suppliers. *Consolidated Gas*, 912 F.2d at 1265 (en banc) (Johnson, J., dissenting in part); *id.* at 1329 (Tjoflat, C.J., dissenting). Based upon a reading of this Court's decisions in *Southern Motor Carriers* and *Town of Hallie*, Judge Tjoflat found that Florida's utility statutes reflected a decision to displace competition with

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[7] Even if the Florida Supreme Court had not previously and repeatedly spoken so directly to the scope of FPSC's authority, the circuit court should have refrained from attempting to draw negative inferences from internal comparisons of various state utility statutes. Surely the circuit court's heavy emphasis on legislative silence must be contrary to this Court's teaching in *Town of Hallie* because it "embodies an unrealistic view of how legislatures work and of how statutes are written." 471 U.S. at 43.

a broad regulatory structure satisfying the "clearly articulated" requirement of the state action doctrine.[8] *Id.*

The conclusions of the Florida Supreme Court, Judge Johnson and Judge Tjoflat are in harmony with the approach that most states take in regulating utility service territories. States typically limit competition between utilities through control over utilities' service areas in order to ensure that each regulated utility will have an economically efficient number of customers, to facilitate long-term planning by stabilizing utility service territories, to minimize the building of environmentally intrusive facilities, and to reduce the costs to utility customers of duplicative facilities. In return for the exclusive right to serve a particular area and as part of the regulatory compact, a utility has "an obligation to serve, fairly and without undue discrimination, all members of the public it holds itself out to serve . . .," [9] with adequate and reliable service. State regulators are responsible for assuring that the rates and charges of a utility are reasonable and for enforcing a utility's service obligations. *Cf. Duquesne Light Co. v. Barasch*, 109 S. Ct. 609 (1989).

In fact, the states have dealt with the regulation of utility service areas in a variety of ways. Some state statutes establish territorial boundaries on the basis of fixed rules with little or no involvement of a state public service commission. *See, e.g., Ala. Code* §§ 37-14-1 and 37-14-30 (1988) (suppliers required to provide service based upon fixed rules such as the proximity of a cus-

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[8] Confirming the FPSC's jurisdiction over territorial agreements between electric suppliers, in 1974 the Florida Legislature expressly authorized Commission jurisdiction over territorial agreements between rural electric cooperatives, municipal electric suppliers, and other electric suppliers. 1974 Fla. Laws 196. The circuit court panel opinion acknowledged that its decision should not "in any way be read to cast doubt" on the proposition that electric utilities are exempt from the Sherman Act. *Consolidated Gas*, 880 F.2d at 301-2 (panel opinion).

[9] A.J.G. Priest, *Principles of Public Utility Regulation*, Vol. I at 228 (1969).

tomer to an existing line); *Idaho Code* § 61-332 (1976) (new customers allocated to utilities under statutory rules based on the distance between the customer and the nearest power distribution line). Other state statutes do not expressly establish service territories but provide instead that before a utility builds any new line, plant or system it must obtain a certificate of public convenience and necessity from a public service commission. In these instances, states simply approach the issue of duplicate facilities on a case-by-case basis as part of the overall regulation of utility service. *See, e.g., Colo. Rev. Stat.* § 40-5-101(2) (1963) (*as interpreted by Town of Fountain v. Public Util. Comm'n.*, 167 Colo. 302, 447 P.2d 527 (1968) (no express creation of service territories but state may assign territories on its own motion or the motion of private parties)); *Mich. Stat. Ann.* § 22,142 (Callaghan 1984) (no direct territorial legislation, but certificate of convenience and necessity mechanism interpreted as being "designed to prevent needless multiplication of companies serving the same territory." *Indiana & Michigan Elec. Co. v. Miller*, 19 Mich. App. 16, 172 N.W.2d 223, 226 (1969)). In yet other instances, public service commissions are empowered to review and approve territorial agreements which are initially developed by affected electric suppliers. *See, e.g., Neb. Rev. Stat.* § 70-1002(3) (1989) (electric suppliers encouraged to enter contracts establishing service territories which must be approved by Power Review Board).

State legislatures have obviously found many different voices to articulate the idea that utility regulation can and should discourage inefficient duplication of electric facilities. Indeed, the virtual chorus of such voices is indicative of the fact that the regulation of rates and the provision of exclusive service territories are complementary regulatory tools. Thus, as the Florida Supreme Court held, the Florida Legislature's former statutory silence on the precise role of the FPSC in the creation of gas service territories should be seen as neither unique nor determinative of legislative intent.

The applicability of state action immunity to regulated public utilities should depend on whether a state legislature has articulated a clear intent to regulate public utilities and whether it is reasonably foreseeable that such regulation may displace competition. *See Town of Hallie*, 471 U.S. at 42-43 (anticompetitive effects can logically result from broad authority to regulate) (citing *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (no express intent to displace the antitrust laws, but statute provided regulatory structure that inherently "displace[d] unfettered business freedom")). Under Section 366 of the Florida Statutes, City Gas clearly does not have unfettered business freedom and the power of the Commission to approve territorial agreements flows inexorably from the virtually "omnipotent" regulatory powers of the FPSC. *See Storey v. Mayo*, 217 So.2d 304, 307 (Fla. 1968).

B. Active Supervision

The circuit court compounded the potential damage of its decision to public utilities by holding that even if the first prong of *Midcal* had been satisfied, the territorial agreement was not actively supervised: "The minimal contact the Commission has had with this agreement is nothing more than a 'gauzy cloak of state involvement' which does not protect it from the constraints of federal antitrust regulation." *Consolidated Gas*, 880 F.2d at 303 (panel opinion). The circuit court's conclusion is at odds with the active supervision standard applied by this Court as well as various courts of appeals, and reflects a serious misunderstanding of the doctrine's theoretical underpinnings.

It is now clear that "the requirement of active supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie*, 471 U.S. at 46. While this Court occasionally has used the metaphor that the active supervision requirement is necessary to prevent a state from circumventing

the Sherman Act's proscriptions "by casting . . . a gauzy cloak of state involvement over what is essentially a private . . . [anticompetitive] arrangement," it has never held, as did the circuit court, that a state regulatory agency can be found to have cast a "gauzy cloak" over private conduct when it both reviews and expressly approves the precise conduct under challenge. *Id.* at 34-5 (quoting *Midcal*, 445 U.S. at 106).

Indeed, it is an absurdity to rely on the "gauzy cloak" metaphor when applying the state action doctrine to the heavily regulated utility industry. This Court's decisions dealing with the "cloaking" of private conduct addressed situations in which states failed to provide *any* governmental means of reviewing private decisions. *See, e.g., Midcal*, 445 U.S. at 106 (California's wine pricing system simply authorized private price setting and accepted without question the prices established by private parties); *Patrick v. Burget*, 108 S. Ct. 1658 (1988) (no forum for substantive review of the decisions of a private peer review board); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 (1987) (no supervising state agency to monitor private pricing decisions). In each of these cases, the state's regulatory blessing was given *before* the terms of the anticompetitive private conduct were even established, and no subsequent review of the private conduct was provided for. These decisions in no way imply that the active supervision test necessitates an inquiry into "whether a particular state's regulatory operation demonstrates satisfactory zeal and agressiveness" or that it necessitates placing the state regulator on trial. *New England Motor Rate Bureau Inc. v. FTC*, 908 F.2d 1064, 1075 (1st Cir. 1990). While "the mere presence of some state involvement or monitoring does not suffice," private anticompetitive conduct must be sheltered if "the State exercises *ultimate control* over the challenged conduct." *Patrick v. Burget*, 108 S. Ct. at 1663 (emphasis added). The fact that a public service commission has the ultimate authority over rates, service and service areas is more than sufficient to provide

a "realistic assurance that [the utility's] anticompetitive conduct promotes state policy." *Id.*; *cf. Southern Motor Carriers*, 471 U.S. at 51 (noting with approval that state public service commissions had "ultimate" authority over rates); *Fuchs v. Rural Electric Convenience Coop.*, 858 F.2d 1210, 1218 (7th Cir. 1988), *cert. denied* 109 S. Ct. 1744 (1989).[10]

EEI is especially troubled by the circuit court's suggestion that private conduct may lose state action immunity because the state failed to "look" hard enough at the data, or by the mere passage of time: "simply because the Commission has on occasion, some 15 to 25 years ago, looked at this agreement does not automatically immunize it from federal antitrust scrutiny." *Consolidated Gas*, 880 F.2d at 303 (panel opinion). The Commission in this case did far more than just "look" at the territorial agreement—the Commission both reviewed and approved the agreement. Moreover, after the agreement was approved, any aggrieved member of the public could have sought modification or termination of the agreement by the Commission on the grounds that it was no longer in the public interest.[11]

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[10] Just as in *Southern Motor Carriers*, where this Court held that a private party acting pursuant to an anticompetitive regulatory policy "need not 'point to a specific, detailed legislative authorization' of its challenged conduct" to satisfy the first prong of *Midcal*, a private party should not need to point to a specific, detailed approval from a state regulatory agency to show that the state established a mechanism to oversee the implementation of the state's anticompetitive policy. 471 U.S. at 64 (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 435 (1978) (opinion Brennan, J.)). As long as the state has established a mechanism of legislative or regulatory oversight which can ensure that private parties will further state regulatory policies, it should be deemed to have satisfied the active supervision requirement.

[11] *Peoples Gas Sys., Inc. v. Mason*, 187 So.2d 335, 339 (Fla. 1966). The active supervision analysis should focus on the availability of state corrective processes and not the litigants' decision to use or forego those processes. *See Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) ("A contrary rule would tempt aggrieved

The lower court also must be wrong in suggesting that regulatory approvals once obtained may at some point go stale.[12] By their very nature, territorial agreements are designed to provide long term stability, yet the circuit court's formulation would require state regulatory agencies to reassess previously approved conduct even if no circumstances had changed to warrant reassessment and no aggrieved party had sought regulatory review. The standard implicit in the Eleventh Circuit's holding would breed inefficiency and unnecessarily burden state regulatory agencies. More importantly, it would improperly require federal courts to dictate standards governing the frequency of review by state regulatory agencies. The circuit court's view that the age of the regulatory approval somehow bears on the validity of that approval should be rejected.

As professors Areeda and Turner have noted, the circuit court's evaluation of the frequency and quality of regulatory consideration would undermine the principles upon which *Parker* is based:

> [F]or many of the same reasons that the Supreme Court refuses strictly to scrutinize state economic regulation under the Fourteenth Amendment, so must the antitrust court accept the state's apparent supervision on its face. There simply is no way to tell if the state has "looked" hard enough at the data, and there certainly are no manageable judicial standards by which a court may weigh the various elements of

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parties to forego available state corrective processes in hopes of obtaining treble damages"). As the First Circuit recently observed, the "absence of complaints in the face of an available procedure to resolve them supports an inference that the state is actively supervising." *New England Motor Rate Bureau*, 908 F.2d at 1075.

[12] The decision offers no guidance for determining how often and to what level of detail such reviews would have to be conducted in order to satisfy the various antitrust tribunals that might ultimately review the quality and frequency of state regulatory oversight. For example, would the court have found the City Gas/Peoples agreement immune if the Commission had "looked" at the agreement five years ago but not six years ago?

> a "public interest" judgment in order to determine whether the legislature or agency decision was correct. Those are political judgments and ought to be made by the legislature and its delegates.

P. Areeda & D. Turner, *Antitrust Law* § 213c at p. 75 (1978). Like the compulsion standard considered in *Southern Motor Carriers*, a stringent active supervision standard such as the one advanced by the circuit court would severely reduce the "range of regulatory alternatives available to the [states]." *See Southern Motor Carriers*, 471 U.S. at 48.

According to the circuit court's analysis, utilities erecting and operating facilities in an exclusive territory approved by their regulators may be on shifting and dangerous sands. At any given moment, a regulatory scheme—and the utilities that must operate within that regulatory scheme—could become vulnerable to attack if regulators are deemed, after-the-fact, to have been deficient in their oversight. EEI submits that federal antitrust courts would be wise to look to the nature and structure of the regulatory system that the legislature created, rather than to the frequency of subsequent regulatory reviews or the diligence and subjective perceptions [13] of state officials charged with carrying out the legislature's objectives. To do otherwise places utilities in the impossible position of second-guessing the efficacy of state regulation and provides an invitation "to place regulators on trial."

The decision below must be viewed for what it is: "a means for federal oversight of state officials and their programs." *New England Motor Rate Bureau*, 908 F.2d at 1071. The circuit court's formulation would turn the state action doctrine on its head. "Instead of being a doctrine of preemption, allowing for the state's own action," it would become a hostage to temporal concerns

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[13] The circuit court should not have been concerned, as it apparently was, with the FPSC's expression of doubt about the authority it in fact exercised over territorial disputes. *See Consolidated Gas*, 880 F.2d at 303 (panel opinion).

about how and when a particular commission exercised the power delegated by the legislature. *Id.* The circuit court's decision regarding the application of the state action doctrine cannot be reconciled with this Court's view of the active supervision test, and undermines the federalism principles upon which the state action doctrine is based.

II. THE LOWER COURTS MISAPPLIED THE LAW OF MONOPOLIZATION

The liability findings against City Gas were premised, in large measure, on the lower courts' invocation of the four-part test of the so-called essential facilities doctrine. Both the district court and the circuit court labeled City Gas' pipeline facilities as an essential facility, and predicated liability on City Gas' refusal to afford its competitor reasonable access to that facility.[14] The courts below plainly viewed the essential facilities test as an independent and distinct tool of monopolization analysis [15] which directs the courts to focus their inquiry on particular "facilities." EEI respectfully submits that such an approach is both incorrect and dangerous because it encourages antitrust courts to short-cut proper monopolization analysis and rely instead on the mechanical application of labels to impose treble damage liability. In this case, such an approach effectively imposed an affirm-

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[14] *See Consolidated Gas*, 880 F.2d at 301 (panel opinion) (City Gas' "massive system of pipes" referred to as an essential facility); 665 F. Supp. 1493, 1534 (S.D. Fla. 1987) (district court opinion) ("pipeline that transported wholesale gas" was an essential facility). It is interesting to note that the district court suggested elsewhere in its opinion that natural gas (rather than the wholesale pipeline) was the essential facility. *See Id.* at 1537 ("natural gas, as opposed to any type of gas, is an essential facility"); *see also* 912 F.2d at 1292 n.31 (en banc) (Tjoflat, C.J., dissenting). The court's apparent confusion only reinforces EEI's concern that unprincipled application of labels may distort proper monopolization analysis.

[15] *See Consolidated Gas* 665 F. Supp. at 1532 (essential facilities doctrine referred to as one of "two distinct lines of cases" imposing a duty to deal).

ative duty to help rivals by requiring City Gas to enter a market in which the firm had not previously participated.

This Court has never applied the essential facilities doctrine as an independent tool of monopolization analysis, and indeed, has never endorsed the doctrine at all. *See* G. Werden, "The Law and Economics of the Essential Facility Doctrine," 32 ST. LOUIS U.L.J. 433, 481 (1987). One scholar recently observed that most Supreme Court cases invoked in support of the doctrine "do not speak of it and can be explained without reference to it." P. Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 ANTITRUST L.J. 841 (1990). Commentators have strongly criticized the doctrine,[16] or have urged that it be narrowly applied.[17] At a minimum, these authorities counsel strongly against the broad but standardless application of the doctrine sanctioned by the circuit court.

Judge Tjoflat correctly recognized the potential distortion of monopolization law that may result from mechanical application of the "shorthand formula" of the essential facilities doctrine, and his observations in this regard are consistent with those of other federal courts and commentators. *See Consolidated Gas*, 912 F.2d at 1287 & n.26 (en banc) (Tjoflat, C.J., dissenting); P. Areeda & H. Hovenkamp, *Antitrust Law* § 736.1a at 701 (Supp. 1989) (essential facilities doctrine described as a label "that beguiles some commentators and courts into pronouncing a duty to deal without analyzing the implications."). In *City of Malden v. Union Electric Co.*, 887 F.2d 157 (8th Cir. 1989), for example, the Eighth Circuit approved a jury instruction emphasizing that the essential facilities

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[16] G. Werden, 32 ST. LOUIS U.L.J. at 480; M. Boudin, "Antitrust Doctrine and the Sway of Metaphor," 75 GEO. L.J. 395, 401-02 (1986) ("Even the Antitrust Division, once a fervent apostle of the bottleneck doctrine, is beginning to have second thoughts.")

[17] *See, e.g.*, P. Areeda, 58 ANTITRUST L.J. at 852 ("Compulsory access, if it exists at all, is and should be very exceptional.")

doctrine can be understood only in the context of the relevant market:

> Plaintiff contends this instruction confused the jury because the concept of geographic market is irrelevant to its bottleneck theory of monopoly, which in plaintiff's view focuses solely on the existence of practical alternatives to an essential facility. Our review of the essential facilities caselaw convinces us that the trial court did not err in placing plaintiff's bottleneck theory in the context of the relevant market. . . . In each of the above-cited cases, the court considered the relevant product and geographic markets in determining whether the defendant exercised monopoly control over the facility in question.

Id. at 162 (citations omitted); *see also Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 494-95 & n.11 (4th Cir. 1986) (labels not a substitute for proper market analysis). The lower courts employed the essential facilities doctrine as an independent tool of analysis, and in so doing, departed from established precedent and pronounced a duty of City Gas to deal without analyzing the far reaching implications of that pronouncement.

Although the district court purported to follow the traditional approach to defining the relevant product and geographic markets,[18] it ignored that analysis when it began to discuss the essential facilities doctrine. Rather than focusing on the wholesale gas market and City Gas' alleged power in that market, the court analyzed the fa-

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[18] EEI certainly agrees with Petitioner and Judge Tjoflat that City Gas must have had monopoly power in the *wholesale market* in order for it to be viewed as a monopolist that controlled an essential facility. In this regard, the circuit court's finding that City Gas had such power even though it never acted as a wholesale seller is shocking. *See Consolidated Gas*, 880 F.2d at 300-01 (panel opinion) ("that City Gas never actually sold any gas under this agreement does not obscure that it had the *power* to do so."). The circuit court erroneously seemed to equate the power to *enter* the market with the power to control price and exclude competition in that market.

cility—a pipeline used for retail gas sales—and assumed that Consolidated was entitled to use that facility for wholesale purchases.[19] As Judge Tjoflat stated it, "the district court took its findings concerning the conditions necessary to enable Consolidated to compete with City Gas and used them as a basis for constructing a relevant (but hypothetical) market." 912 F.2d at 1280 (en banc) (Tjoflat, C.J., dissenting).[20] By focusing on City Gas' facilities rather than its role in and power over the wholesale market, the lower courts fashioned a duty to deal that had the startling effect of forcing City Gas to enter the wholesale business for the first time.

The Eleventh Circuit's holding that City Gas' pipeline facilities were essential also represents an unprecedented and counterproductive extension of the law of monopolization. Even in the handful of decisions that have applied the essential facilities doctrine, the courts have required a high degree of impracticability and infeasibility before characterizing a particular facility as essential. *Compare MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132 (7th Cir. 1983) (millions of miles of cable; regulatory authorization to duplicate could not be obtained) *with Flip Side Productions, Inc. v. JAM Productions, Ltd.*, 843 F.2d 1024, 1034 (7th Cir. 1988) (arena not essential facility where alternatives were available). Commentators have likewise urged that facilities should be regarded as essential only if they are vital to competitive viability:

> Because the focus of the antitrust laws is always on competition, an essential facility is, at a minimum, a resource possessed by the defendant that is vital to the plaintiff's competitive viability. Obviously, the

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[19] *See Consolidated Gas*, 912 F.2d at 1271 n.7 (*en banc*) (Tjoflat, C.J., dissenting) ("Perhaps the problem was that Consoliated's expectations, which the district court seems to have adopted, were entirely unreasonable.")

[20] The circuit court employed similarly incorrect reasoning. *See Consolidated Gas* 880 F.2d at 301 (panel opinion).

> defendant's resource is not vital if an equivalent is available from other sources. Nor is it essential if the plaintiff can compete effectively without it. The plaintiff must show that the desired resource is not just helpful but vital to his competitive viability. Unless vital, moreover, competition would be increased by encouraging the plaintiff or others to develop rival facilities rather than to take the easier and less competitive course of obtaining access to another's facilities.

P. Areeda & H. Hovenkamp, *Antritrust Law* § 736.2(b) (Supp. 1990). The more lenient standard employed below wrongly suggests a duty to deal on the basis of the convenience or the subjective preferences of the firm seeking access to the facility. *See Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 375 (7th Cir. 1986) ("Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches."). Such a standard would penalize firms that take the initiative and risk to build facilities that produce market efficiencies, and would thereby "compel the very sloth [the antitrust laws] were intended to prevent." *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied* 444 U.S. 1093 (1980); P. Areeda, 58 ANTITRUST L.J. at 851 ("required sharing discourages building facilities . . . even though they benefit consumers.").

The decision below is also troublesome in its conclusion that City Gas effectively denied the use of its pipeline facilities because City Gas and Consolidated could not agree on a wholesale price. The district court found that City Gas' proposal amounted to an unreasonable refusal to deal even though the court did not decide what a reasonable price would have been. *Consolidated Gas*, 665 F. Supp. at 1534. While the articulation of a standard

of reasonableness in this context is admittedly difficult,[21] the result of the court's decision to dodge the issue may be to condemn firms controlling such "essential facilities" to provide rivals with unwarranted access to these facilities or face treble damage claims.

The circuit court's application of the essential facilities doctrine has potentially far-reaching implications. The essential facilities doctrine increasingly has been the focus of federal court litigation, not only in the electric utility industry but in other industries which have undergone partial deregulation such as the natural gas, telephone, railroad and airline industries. The doctrine also has been applied in the administrative context as part of the federal agencies' efforts to apply antitrust principles.[22] Although the essential facilities doctrine has been the subject of considerable judicial and academic debate, the lower federal courts and federal agencies have not had definitive guidance from this Court on such basic issues as whether the doctrine may be applied as an independent theory of monopolization law, what makes a facility "essential," and what makes denial of access unreasonable. It is clear from the circuit court's misunderstanding of the essential facilities doctrine that the writ should be issued in order for the Court to resolve the issues left for another day in *Aspen Skiing.*[23]

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[21] *Cf. Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 27 (1st Cir. 1990) ("What antitrust benefit would be gained by permitting juries to speculate" concerning what constitutes a fair rate of return?); *Consolidated Gas*, 912 F.2d at 1318-19 (en banc) (Tjoflat, C.J., dissenting).

[22] *See, e.g., Utah Power & Light Co.*, 45 FERC ¶ 61,095 (1988).

[23] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 n.44 (1985).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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NO. 90-953

in the Supreme Court of the United States

October Term, 1990

CITY GAS COMPANY OF FLORIDA,
Petitioner,

vs.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT MOTION TO GRANT CERTIORARI, VACATE JUDGMENT OF COURT OF APPEALS AND REMAND WITH DIRECTIONS TO VACATE JUDGMENT OF DISTRICT COURT ON GROUNDS OF MOOTNESS

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The parties[1] to this proceeding jointly move the Court to grant certiorari, vacate the judgment of the Court of

[1]The statement of City Gas Company of Florida pursuant to Supreme Court Rule 29.1 can be found at page 1, note 1 of its Petition. Pursuant to that rule, Consolidated Gas Company of Florida, Inc. states that it has no parents or subsidiaries.

Appeals for the Eleventh Circuit and remand the case to the court of appeals with instructions to vacate the district court's August 14, 1987 Final Judgment and July 24, 1987 Findings of Fact and Conclusions of Law and remand for dismissal of this action with prejudice.

This case has been settled amicably by the parties and general releases have been exchanged. The parties' settlement agreement obligates respondent to file a Satisfaction of Judgment if the Final Judgment entered by the district court remains extant and prohibits respondent from initiating proceedings before the Florida Public Service Commission so as to invoke the injunctive relief granted by the district court. The case is, accordingly, moot. As this Court noted in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *See, e.g., Onwuasoanya v. United States*, 488 U.S. 920 (1988); *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988) ("When a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint"); *Russoniello v. Olagues*, 484 U.S. 806 (1987); *Tulare Lake Canal Co. v. United States*, 459 U.S. 1095 (1983); *Alabama v. Davis*, 446 U.S. 903 (1980). *See generally* 13A C. Wright et al., *Federal Practice and Procedure* § 3533.10 at 433-35 (1984). In accordance with this authority, the parties respectfully request that this Court grant certiorari, vacate the judgment of the court of appeals and remand the case with instructions that the court of appeals vacate the Final Judgment and Findings of Fact and Conclusions of Law entered by the district court on the grounds of mootness and remand to the district court for dismissal with prejudice.

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